TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 731

SAMUEL S. KOENIG, JOHN J. KNEWITZ, AND WILLIAM L. WARD, PETITIONERS,

vs.

EDWARD J. FLYNN, SECRETARY OF STATE OF THE STATE OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1932

CERTIORARI GRANTED MARCH 15, 1932

(36,545)

(36,545)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 16, 1932

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Supreme Court,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER

OF

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order,

Petitioners,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervener-Respondent.

Statement Under Rule 234.

This proceeding was instituted by the service of the notice of motion and petition on October 2nd, 1931.

The answer to the petition was served on October 13th, 1931.

The names of the original petitioners are Samuel S. Koenig, John J. Knewitz and William L. Ward.

The name of the original respondent is Edward J. Flynn, Secretary of State of the State of New York.

Statement Under Rule 234.

James A. Farley, Chairman of the Democratic State Committee, was permitted to intervene by order of the Court dated October 15th, 1931.

The petitioners' attorneys are Abraham S. Gilbert and Benjamin L. Fairchild.

The attorney for respondent, Edward J. Flynn, Secretary of State of the State of New York, is John J. Bennett, Jr., Attorney General.

The attorney for the intervener-respondent is John Godfrey Saxe.

There have been no changes of parties or attorneys herein.

Notice of Appeal.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER

OF

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order,

Petitioners,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervener-Respondent.

SIRS:

PLEASE TAKE NOTICE that the petitioners, Samuel S. Koenig, John J. Knewitz and William L. Ward appeal to the Appellate Division of the Supreme Court, Third Department, from the order made and entered herein by Honorable Ellis J. Staley and filed in the office of the Clerk of the County of Albany on the 12th day of November, 1931, denying petitioners' application for a mandamus order against the respondent Edward J. Flynn, Secretary

of State of the State of New York, and from each and every part of said order.

Dated, New York, November 12, 1931.

Yours, &c.,

ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners,
Office & P. O. Address,
Room 2810, No. 10 East 40th St.,
11 Borough of Manhattan,
New York City.

To:

Hon. JOHN J. BENNETT, JR.,
Attorney General, Attorney for
respondent Edward J. Flynn,
Secretary of State.

JOHN GODFREY SAXE, Esq.,
Attorney for James A. Farley,
Chairman of the Democratic
State Committee.

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Order Appealed From.

At a Special Term of the Supreme Court, Albany County, held in the City of Kingston, on the 15th day of October, 1931.

Present—Honorable ELLIS J. STALEY, *Justice.*

IN THE MATTER
OF

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order,

Petitioners,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervener-Respondent.

The petitioners having moved this Court for a peremptory mandamus order directing the respondent Edward J. Flynn, as Secretary of the State of New York, in issuing his certificate or certificates in the year 1932, pursuant to the Election Law of the State of New York to the Board of Elections of each county of the State of New York and of the City of New York, certifying who may lawfully be voted for at the general election to be held in 1932, to certify that forty-five Representatives in the House of Rep-

16 *Order Appealed From.*

resentatives of the Congress of the United States in the Seventy-third Congress are to be elected in the Congressional Districts as defined in the Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, entitled "Concurrent Resolution of the Senate and Assembly, constituting the Legislature of the State of New York, subdividing the State of New York into forty-five Congressional Districts and defining the boundaries thereof", and that he be directed to perform every other duty devolving on him under the Election Law pertaining to any matter con-
17 tained in said Concurrent Resolution in accordance with said Concurrent Resolution, and not otherwise, and for such other and further relief as may be just and proper,

Now, after reading and filing the petition dated and verified October 1st, 1931, and the answer of the respondent Edward J. Flynn thereto, verified October 13th, 1931, and the court having granted the motion of James A. Farley, Chairman of the Democratic State Committee, to intervene as a respondent, and said intervener respondent James A. Farley having joined in the answer interposed by
18 the respondent Edward J. Flynn, Secretary of State, and both respondents having withdrawn the denials contained in said answer to the allegations contained in paragraphs "Twelfth" and "Thirteenth" of the petition, and upon the argument the petitioners having conceded that the petition was for a peremptory order of mandamus, and the Court having heard Abraham S. Gilbert and Benjamin L. Fairchild of counsel for petitioners in support of the motion, and Hon. Henry Epstein, Deputy At-

torney General, for the respondent Edward J. Flynn, Secretary of State, and Hon. Robert F. Wagner and Hon. John J. O'Connor, counsel for intervener-respondent James A. Farley, Chairman of the Democratic State Committee, and

Now, after due consideration, it is

ORDERED that the said motion for a peremptory mandamus order be and the same hereby is denied as matter of law and not in the exercise of discretion, without costs.

Enter,

ELLIS J. STALEY,
J. S. C.

22 **Notice of Motion for Mandamus.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER

of

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order

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against

EDWARD J. FLYNN, Secretary of State of the State of New York.

TO HONORABLE EDWARD J. FLYNN, SECRETARY OF STATE OF THE STATE OF NEW YORK:

PLEASE TAKE NOTICE that the petitioners above-named will move this Court at a Special Term thereof to be held at the City of Albany, County of Albany, State of New York, on the 10th day of October, 1931, at 10 o'clock in the forenoon of that day, for a mandamus order directing the respondent, Edward J. Flynn, as Secretary of State of the State of New York, in issuing his certificate or certificates in the year 1932 pursuant to the Election Law of the State of New York to the Board of Election of each county in the State of New York, and of the City of New York, certifying who may lawfully be voted for at the general election to be held in 1932, to certify that forty-five Representatives in the House of Representatives of the Con-

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gress of the United States in the Seventy-third Congress are to be elected in the Congressional Districts as defined in the Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, entitled "Concurrent Resolution of the Senate and Assembly, constituting the Legislature of the State of New York, subdividing the State of New York into forty-five Congressional Districts and defining the boundaries thereof", Exhibit D hereto annexed, and that he be directed to perform every other duty devolving on him under the Election Law pertaining to 26
any matter contained in said Concurrent Resolution in accordance with said Concurrent Resolution, and not otherwise, and for such other and further relief as may be just and proper.

Dated, New York, October 1st, 1931.

Yours, etc.,

ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners,
Office Address,
Room 2810, 27
No. 10 East 40th Street,
Borough of Manhattan,
New York City.

28 **Petition for Mandamus.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER

of

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Man-
29 damus Order

against

EDWARD J. FLYNN, Secretary of State of the State of New York.

The petitioners by Abraham S. Gilbert and Benjamin L. Fairchild, their attorneys, for their petition herein allege:

FIRST: That they are severally citizens and qualified voters of the State of New York, and that the
30 petitioner Samuel S. Koenig is the Chairman of the Republican County Committee of New York County; that the petitioner John J. Knewitz is the Chairman of the Republican County Committee of Bronx County; and that the petitioner William L. Ward is the Chairman of the Republican County Committee of Westchester County.

SECOND: That the respondent is the Secretary of State of the State of New York, and that his term of office will expire on December 31st, 1932.

THIRD: That the Congress of the United States, pursuant to the provisions of the Constitution of the United States, by the Act of Congress of June 18th, 1929, duly provided for the taking of the Fifteenth and subsequent decennial censuses of the people of the United States and otherwise as in said Act of Congress provided, of which a copy is hereto annexed as Exhibit "A" and reference thereto is made as fully as if herein set forth at length.

FOURTH: That said Act of Congress of June 18th, 1929, provided, among other things, that following the taking of the Fifteenth Census, the President of the United States should transmit to Congress a Statement showing the population figures in each State and the number of Representatives to which each State would be entitled as prescribed in said Act of Congress.

FIFTH: That in conformity with the provisions of the Act of June 18th, 1929, the President duly transmitted to the Congress a message under date of December 4th, 1930, with a statement showing the population of the various States under the Fifteenth (1930) Census and the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives as directed to be made in and by said Act of Congress, and that the Congress to which such statement of the President was transmitted failed to enact a law apportioning Representatives among the several States. A copy of said message of the President and of said statement is hereto annexed as Exhibit "B" and reference thereto made as fully as if herein set forth at length.

34 *Petition for Mandamus.*

SIXTH: That on March 4th, 1931, the Clerk of the House of Representatives duly certified to the Governor of the State of New York pursuant to said Act of Congress of June 18th, 1929, as follows: "The State of New York shall be entitled in the Seventy-third Congress and in each Congress thereafter until the taking effect of a re-apportionment under said Act or subsequent statute, to forty-five (45) Representatives in the House of Representatives of the Congress of the United States", and thereby duly certified that the number of Represen-
35 tatives of the State of New York in the House of Representatives in the Seventy-third Congress was forty-five instead of forty-three as heretofore. A copy of said certificate is hereto annexed as Exhibit "C" and reference thereto made as fully as if herein set forth at length.

SEVENTH: That on April 10th, 1931, the Senate and Assembly of the State of New York adopted a Concurrent Resolution, a copy of which is hereto annexed as Exhibit "D" and reference thereto made as fully as if herein set forth at length, and that said Concurrent Resolution was not submitted to
36 the Governor under Section 9 of Article IV of the Constitution of the State of New York.

EIGHTH: That the last subdivision or districting of the State of New York into Congressional Districts prior to the adoption of said Concurrent Resolution of April 10, 1931, was by chapter 890 of the Laws of 1911 of the State of New York, as amended, and that said Act and Amendments subdivided the State into forty-three Congressional Districts pursuant to the Act of Congress of August 8th, 1911, and apportioned to the County of New York

37

10 Congressional Districts and fractions or parts of two additional Congressional Districts, to the County of Bronx one Congressional District and fraction or parts of two additional Congressional Districts, and to the County of Westchester fractions or parts of two Congressional Districts.

NINTH: That as will more fully appear from said Concurrent Resolution of April 10, 1931, it purports to apportion to the County of New York six Congressional Districts, to the County of Bronx four Congressional Districts, and to the County of Westchester two Congressional Districts.

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TENTH: That pursuant to the provisions of section 69 of the Election Law of the State of New York, it is the duty of the respondent, as Secretary of State, at least three months before the general election to be held in November, 1932, to make and transmit to the Boards of Elections of each county of the State and of the City of New York a certificate or certificates stating, among other things, the number of Representatives in Congress who may be lawfully voted for at such election by the voters of the respective counties of the State.

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ELEVENTH: That on or about the 4th day of August, 1931, Honorable John J. Bennett, Jr., as Attorney General of the State of New York, in a communication addressed to the respondent above named, as Secretary of State, and published in the press of the State, rendered his opinion and advised said respondent that the said Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, Exhibit "D" hereto annexed, was ineffective, and advised the re-

spondent as Secretary of State that in issuing his certificate or certificates pursuant to section 69 of the Election Law at least three months prior to the general election to be held in November, 1932, it would be his official duty to disregard the said Concurrent Resolution of April 10th, 1931, and treat the same as ineffective, and issue his certificate or certificates for the election of Representatives in Congress in accordance with the provisions of chapter 890 of the Laws of 1911, as amended. That said Attorney General is a constitutional officer of the State of New York and is the head of the department of law, and that as such he is the legal adviser of all departments of the State, including that of this respondent, and has charge and control of all legal matters in which any department requires the services of an attorney or counsel, except the Military Department.

TWELFTH: That following the publication of such opinion and advice of the Attorney General of the State of New York to the respondent, as Secretary of State, the petitioners above named duly demanded of the Secretary of State that in issuing his certificate or certificates under section 69 of the Election Law with respect to the election of Representatives in Congress at the general election to be held in November, 1932, he certify that the voters of the various counties of the State of New York would be entitled to vote at the general election to be held in November, 1932, for the number of Representatives in Congress prescribed and provided for in and pursuant to the provisions of said Concurrent Resolution of April 10, 1931, Exhibit "D" hereto annexed.

THIRTEENTH: That the respondent, Secretary of State, has neglected and refused to advise your petitioners that he will comply with said demand, and on information and belief, your petitioners allege that the respondent intends to be governed by and to follow the opinion of the Attorney General and intends to treat the said Concurrent Resolution, Exhibit "D" hereto annexed as ineffective, and further intends to certify to the Board of Elections of each county and of the City of New York that Representatives in Congress should be elected by the people of the State of New York at the general election to be held in November, 1932, in the Districts prescribed in and by chapter 890 of the Laws of 1911, as amended.

FOURTEENTH: That the controversy involved in this cause brings into question the construction of section 4 of Article I of the Constitution of the United States and of the Acts of Congress of August 8th, 1911, and June 18th, 1929, as well as the validity, effectiveness and constitutionality of said Concurrent Resolution of April 10th, 1931, Exhibit "D" hereto annexed.

FIFTEENTH: That the general election to be held in November, 1932, will be held on November 7th, 1932, and that the certificate of the Secretary of State, pursuant to section 69 of the Election Law, is required by said section to be filed with the various Boards of Election at least three months prior thereto, to wit: not later than the 7th day of August, 1932.

SIXTEENTH: That it is a matter of grave public importance that the various questions presented by

the controversy thus arising between the petitioners and the respondent as Secretary of State of the State of New York shall be disposed of at the earliest possible date by the courts, to the end that the public officers of the State of New York on whom the duty is imposed to carry out the provisions of the New York Election Law will know definitely whether or not they are to be governed as to their various public acts by said Concurrent Resolution of April 10th, 1931, Exhibit "D" hereto annexed, and that the prompt consideration of the questions presented is also essential because of necessary
47 steps under the Election Law which must be taken long prior to the issuance of the certificates by the respondent, as Secretary of State, pursuant to section 69 of the Election Law.

WHEREFORE the petitioners above-named pray that a mandamus order issue out of and under the seal of this court, directing the respondent, Edward J. Flynn, as Secretary of State of the State of New York, in issuing his certificate or certificates in the year 1932 pursuant to the Election Law of the State of New York to the Board of Elections of each county in the State of New York and of the
48 City of New York, certifying who may lawfully be voted for at the general election to be held in 1932, to certify that forty-five Representatives in the House of Representatives of the Congress of the United States in the Seventy-third Congress are to be elected in the Congressional Districts as defined in the Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, entitled "Concurrent Resolution of the Senate and Assembly, constituting the Legislature of the State of New York, subdividing the State of New York into forty-five Congressional

Districts and defining the boundaries thereof", Exhibit "D" hereto annexed, and that he be directed to perform every other duty devolving on him under the Election Law pertaining to any matter contained in said Concurrent Resolution in accordance with said Concurrent Resolution, and not otherwise, and for such other and further relief as may be just and proper.

Dated, October 1st, 1931.

SAMUEL S. KOENIG,
JOHN J. KNEWITZ,
WILLIAM L. WARD,
(Petitioners).

ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners.

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

WILLIAM L. WARD, being duly sworn, says:

That he is one of the petitioners named in the above-entitled proceeding. That he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM L. WARD.

Sworn to before me this
1st day of October, 1931.

FREDERICK W. DEARING,
Notary Public,
Westchester County.
(Seal)

52 **Exhibit "A".**

[PUBLIC—No. 13—71ST CONGRESS]

[S. 312]

An Act To provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a census of population, agriculture, irrigation, drainage, distribution, unem-
53 ployment, and mines shall be taken by the Director of the Census in the year 1930 and every ten years thereafter. The census herein provided for shall include each State, the District of Columbia, Alaska, Hawaii, and Porto Rico. A census of Guam, Samoa, and the Virgin Islands shall be taken in the same year by the respective governors of said islands and a census of the Panama Canal Zone by the Governor of the Canal Zone, all in accordance with plans prescribed or approved by the Director of the Census.

SEC. 2. That the period of three years beginning
54 the 1st day of January in the year 1930 and every tenth year thereafter shall be known as the decennial census period, and the reports upon the inquiries provided for in said section shall be completed within such period: *Provided,* That the tabulation of total population by States as required for the apportionment of Representatives shall be completed within eight months from the beginning of the enumeration and reported by the Director of the Census to the Secretary of Commerce and by him to the President of the United States.

Exhibit "A".

SEC. 3. That there may be employed in the Bureau of the Census, in addition to the force provided for by the appropriation Act for the fiscal year immediately preceding the decennial census period, two assistant directors, one of whom shall act as executive assistant to the director, performing, in addition, the duties usually assigned to the chief clerk, and the other, who must be a person of known and tried experience in statistical work, as technical and statistical advisor; these officials to be appointed by the Secretary of Commerce, upon the recommendation of the Director of the Census, in conformity with the civil service laws and rules.

In addition to the force hereinbefore provided for, there may be appointed by the Director of the Census, without regard to the provisions of the Classification Act, for any period not extending beyond the decennial census period, at rates of compensation to be fixed by him, as many temporary employees in the District of Columbia as may be necessary to meet the requirements of the work: *Provided,* That census employees who may be transferred to any such temporary positions shall not lose their permanent civil-service status by reason of such transfer: *Provided further,* That hereafter in making appointments to clerical and other positions in the executive branch of the Government in the District of Columbia or elsewhere preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such, and to the wives of injured soldiers, sailors, and marines, who themselves are not qualified, but whose wives are qualified, to hold such positions: *Provided further,* That all such temporary appointments shall be made in conformity with the civil service laws and rules: *Provided further,* That in

58 *Exhibit "A".*

making any appointments under this Act to positions in the District of Columbia or elsewhere, preference shall be given to persons discharged under honorable conditions from the military or naval forces of the United States who served in such force during the time of war and were disabled in the line of duty, to their widows, and to their wives if the husband is not qualified to hold such positions.

That special agents, supervisors, supervisors' clerks, enumerators, and interpreters may be ap-
59 pointed by the Director of the Census to carry out the provisions of this Act and of the Act to provide for a permanent Census Office, approved March 6, 1902, and Acts amendatory thereof or supplemental thereto, such appointments to be made without regard to the Civil Service laws or the Classification Act of 1923, as amended, except that such special agents shall be appointed in accordance with the Civil Service laws. The Director of the Census may delegate to the supervisors authority to appoint enumerators. The enlisted men and officers of the Army, Navy, and Marine Corps may be appointed and compensated for the enumeration of Army,
60 Navy, and Marine, and other military posts. Employees of the Department of Commerce and other departments and independent officers of the Government may, with the consent of the head of the respective department or office, be employed and compensated for field work in connection with the Fifteenth Decennial Census. The special agents, supervisors, supervisors' clerks, enumerators, and interpreters thus appointed shall receive compensation at rates to be fixed by the director of the Census: *Provided,* That special agents appointed

at a per diem rate shall not be paid in excess of $8 per diem except as hereinafter provided; and that the compensation on a piece-price basis may be fixed without limitation as to the amount earned per diem: *Provided further,* That during the decennial census period the Director of the Census may fix the compensation of not to exceed twenty-five special agents at an amount not to exceed $12 per diem: *Provided further,* That permanent employees of the Census Office and special agents may be detailed, when necessary, to act as supervisors or enumerators, such permanent employes and special agents to have like authority with and perform the same duties as the supervisors or enumerators in respect to the subjects committed to them under this Act.

SEC. 4. That the fifteenth and subsequent censuses shall be restricted to inquiries relating to population, to agriculture, to irrigation, to drainage, to distribution, to unemployment, and to mines. The number, form, and subdivision of the inquiries in the schedules used to take the census shall be determined by the Director of the Census, with the approval of the Secretary of Commerce.

SEC. 5. That each supervisor shall perform such duties as may be imposed upon him by the Director of the Census in the enforcement of this Act, and the duties thus imposed shall be performed in any and all particulars in accordance with the orders and instructions of the Director of the Census; that each enumerator or other employee detailed to serve as enumerator shall be charged with the collection in his subdivision of the facts and statistics called for on the population and agricutural schedules, and such other schedules as the Director of

the Census may determine shall be used by him in connection with the census. It shall be the duty of each enumerator to visit personally each dwelling house in his subdivision, and each family therein, and each individual living out of a family in any place of abode, and by inquiry made of the head of each family, or of the member thereof deemed most competent and trustworthy, or of such individual living out of a family, to obtain each and every item of information and all particulars required for the census; and in case no person shall be found at the
65 usual place of abode of such family, or individual living out of a family, competent to answer the inquiries, then it shall be lawful for the census employee to obtain the required information as nearly as may be practicable from the family or families or person or persons living nearest to such place of abode who may be competent to answer such inquiries.

SEC. 6. That the census of the population and of agriculture required by section 1 of this Act shall be taken as of the 1st day of April, and it shall be the duty of each enumerator to commence the enu-
66 meration of his district on the day following unless the Director of the Census in his discretion shall change the date of commencement of the enumeration in said district by reason of climatic or other conditions which would materially interfere with the proper conduct of the work; but in any event it shall be the duty of each enumerator to prepare the returns hereinbefore required to be made and to forward the same to the supervisor of his district within thirty days from the commencement of the enumeration of his district: *Provided,* that in any city having two thousand five hundred inhabitants

or more under the preceding census the enumeration of the population shall be completed within two weeks from the commencement thereof.

SEC. 7. That if any person shall receive or secure to himself any fee, reward, or compensation as a consideration for the appointment or employment of any person as supervisor, enumerator, or clerk, or other employee, or shall in any way receive or secure to himself any part of the compensation paid to any supervisor, enumerator, clerk, or other employee, he shall be deemed guilty of a felony, and 68
upon conviction thereof shall be fined not more than $3,000 or be imprisoned not more than five years, or both.

SEC. 8. That any supervisor, supervisor's clerk, enuremator, interpreter, special egant, or other employee who, having taken and subscribed the oath of office, shall, without justifiable cause, neglect or refuse to perform the duties enjoined on him by this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding $500; or if he shall, without the authority of the Director of the Census, publish or commu- 69
nicate any information coming into his possession by reason of his employment under the provisions of this Act, or the Act to provide for a permanent Census Office or Acts amendatory thereof or supplemental thereto, he shall be guilty of a felony and upon conviction thereof shall be fined not to exceed $1,000 or be imprisoned not to exceed two years, or both so fined and imprisoned in the discretion of the court; or if he shall willfully and knowingly swear or affirm falsely as to the truth of any statement required to be made or subscribed by him un-

der oath by or under authority of this Act or of the Act to provide for a permanent Census Office or Acts amendatory thereof or supplemental thereto, he shall be deemed guilty of perjury, and upon conviction thereof shall be fined not exceeding $2,000 or imprisoned not exceeding five years, or both; or if he willfully and knowingly make a false certificate or a fictitious return he shall be guilty of a felony, and upon conviction of either of the last-named offenses he shall be fined not exceeding $2,000 or be imprisoned not exceeding five years, or both; or if any person who is or has been an enumerator shall knowingly or willfully furnish or cause to be furnished, directly or indirectly, to the Director of the Census or to any supervisor or other employee of the census any false statement or false information with reference to any inquiry for which he was authorized and required to collect information, he shall be guilty of a felony, and upon conviction thereof shall be fined not exceeding $2,000 or be imprisoned not exceeding five years, or both.

SEC. 9. That it shall be the duty of all persons over eighteen years of age when requested by the Director of the Census, or by any supervisor, enumerator, or special agent, or other employee of the Census Office, acting under the instructions of said director, to answer correctly, to the best of their knowledge, all questions on the census schedules applying t othemselves and to the families to which they belong or are related, and to the farm or farms of which they or their families are the occupants; and any person over eighteen years of age who, under the conditions hereinbefore stated, shall refuse or willfully neglect to answer any of these ques-

tions, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding $100 or be imprisoned not exceeding sixty days, or both, and any such person who shall willfully give answers and are false shall be fined not exceeding $500 or be imprisoned not exceeding one year, or both.

And it is hereby made unlawful for any individual, committee, or other organization of any kind whatsoever, to offer or render to any supervisor, supervisor's clerk, enumerator, interpreter, special agent, or other officer or employee of the Census 74
Office engaged in making an enumeration of population, either directly or indirectly, any suggestion, advice, or assistance of any kind, with the intent or purpose of causing an inaccurate enumeration of population to be made, either as to the number of persons residing in any district or community, or in any other respect; and any individual, or any officer or member of any committee or other organization of any kind whatsoever, who directly or indirectly offers or renders any such suggestion, advice, information, or assistance, with such unlawful intent or purpose, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined 75
not exceeding $1,000, or be imprisoned for not exceeding one year, or both.

And it shall be the duty of every owner, proprietor, manager, superintendent, or agent of a hotel, apartment house, boarding or lodging house, tenement, or other building, when requested by the Director of the Census, or by any supervisor, enumerator, special agent, or other employee of the Census Office, acting under the instructions of the said director, to furnish the names of the occupants of said hotel, apartment house, boarding or lodging

house, tenement, or other building, and to give thereto free ingress and egress therefrom to any duly accredited representative of the Census Office, so as to permit the collection of statistics for census purposes, including the proper and correct enumeration of all persons having their usual place of abode in said hotel, apartment house, boarding or lodging house, tenement, or other building; and any owner, proprietor, manager, superintendent, or agent of a hotel, apartment house, boarding or lodging house, tenement, or other building who
77 shall refuse or willfully neglect to give such information or assistance under the conditions hereinbefore stated shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding $500.

SEC. 10. That it shall be the duty of every owner, official, agent, person in charge, or assistant to the person in charge, of any company, business, institution, establishment, religious body, or organization of any nature whatsoever, to answer completely and correctly to the best of his knowledge all questions relating to his respective company, busi-
78 ness, institution, establishment, religious body, or other organization, or to records or statistics in his official custody, contained on any census schedule prepared by the Director of the Census under the authority of this Act, or of the Act to provide for a permanent Census Office, approved March 6, 1902, or of Acts amendatory thereof or supplemental thereto; and any person violating the provisions of this section by refusing or willfully neglecting to answer any of said questions, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding $500, or im-

prisonment for a period not exceeding sixty days, or both so fined and imprisoned, and any person violating the provisions of this section by willfully giving answers that are false shall be fined not exceeding $10,000 or imprisoned for a period not exceeding one year, or both.

SEC. 11. That the information furnished under the provisions of this Act shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Census Office whereby the data furnished by any particular establishment or individual can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports. 80

SEC. 12. All fines and penalties imposed by this Act may be enforced by indictment or information in any court of competent jurisdiction.

SEC. 13. That the Director of the Census is hereby authorized to make requisitions upon the Public Printer for such printing as may be necessary to carry out the provisions of this Act, to wit: Blanks, schedules, circulars, pamphlets, envelopes, work sheets, and other items of miscellaneous printing; that he is further authorized to have printed by the Public Printer, in such editions as the director may deem necessary, preliminary and other census bulletins, and final reports of the results of the several investigations authorized by this Act or by the Act to establish a permanent Census Office and Acts amendatory thereof or supplemental thereto and to publish and distribute said bulletins and reports. 81

82 *Exhibit "A".*

SEC 14. That all mail matter, of whatever class or weight, relating to the census and addressed to the Census Office, or to any official thereof, and indorsed "Official business, Census Office," shall be transmitted free of postage, and by registered mail if necessary, and so marked: *Provided*, That if any person shall make use of such indorsement to avoid the payment of postage or registry fee on his or her private letter, package, or other matter in the mail, the person so offending shall be guilty of a misdemeanor and subject to a fine of $300, to be prosecut-
83 ed in any court of competent jurisdiction.

SEC. 15. That the Secretary of Commerce, whenever he may deem it advisable, on request of the Director of the Census, is hereby authorized to call upon any other department or office of the Government for information pertinent to the work herein provided for.

SEC. 16. That there shall be in the year 1935, and once every ten years thereafter, a census of agriculture and livestock, which shall show the acreage of farm land, the acreage of the principal crops, and the number and value of domestic ani-
84 mals on the farms and ranges of the country. The schedule employed in this census shall be prepared by the Director of the Census. Such census shall be taken as of the 1st day of January and shall relate to the crop year. The Director of the Census may appoint enumerators or special agents for the purpose of this census in accordance with the provisions of the permanent census Act.

SEC. 17. That the Director of the Census be, and he is hereby, authorized and directed to collect and publish, for every second year after 1927, statistics

of manufacturing industries; and the director is hereby authorized to prepare such schedules as in his judgment may be necessary.

SEC. 18. That the Director of the Census be, and he is hereby, authorized at his discretion, upon the written request of the governor of any State or Territory or of any court of record, to furnish such governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies and $1 additional 86
for certification; and that the Director of the Census is further authorized, in his discretion, to furnish to individuals such data from the population schedules as may be desired for genealogical or other proper purposes, upon payment of the actual cost of searching the records and $1 for supplying a certificate; and that the Director of the Census is authorized to furnish transcripts of tables and other records and to prepare special statistical compilations for State or local officials, private concerns, or individuals upon the payment of the actual cost of such work: *Provided, however,* That in no case shall information furnished under the au- 87
thority of this Act be used to the detriment of the person or persons to whom such information relates. All moneys hereafter received by the Bureau of the Census in payment for labor and materials used in furnishing transcripts of census records or special statistical compilations from such records shall be deposited to the credit of the appropriation for collecting statistics.

SEC. 19. That the Director of the Census may authorize the expenditure of necessary sums for the

actual and necessary traveling expenses of the officers and employees of the Census Office, including an allowance in lieu of subsistence not exceeding $6 per day during their necessary absence from the Census Office, or, instead of such an allowance, their actual subsistence expenses, not to exceed $7 per day: *Provided,* That employees of the bureau may be paid in lieu of all transportation expenses not to exceed 7 cents per mile for the use of their own automobiles or not to exceed 3 cents per mile for the use of their own motor cycles when used for
89 necessary travel on official business.

SEC. 20. For the purpose of carrying out the provisions of this Act during the fifteenth decennial census period, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $39,593,000.

SEC. 21. That the Act establishing the permanent Census Office, approved March 6, 1902, and Acts amendatory thereof and supplemental thereto, except as are herein amended, shall remain in full force. That the Act entitled "An Act to provide for the fourteenth and subsequent decennial cen-
90 suses," approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.

SEC. 22. (a) On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subse-

quent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners:

(1) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member;

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(2) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of major fractions, no State to receive less than one Member; and

(3) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of equal proportions, no State to receive less than one Member.

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(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this Act or subsequent statute, to the number of Representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the Clerk of the last House of Repre-

sentatives forthwith to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the officer who, under section 32 or 33 of the Revised Statutes, is charged with the preparation of the roll of Representatives-elect.

(c) This section shall have no force and effect in respect of the apportionment to be made under any decennial census unless the statement required by subdivision (a) of this section in respect of such census is transmitted to the Congress within the time prescribed in subdivision (a).

Approved, June 18, 1929.

Exhibit "B".

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MESSAGE

From

THE PRESIDENT OF THE UNITED STATES

Transmitting

STATEMENT PREPARED BY THE BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, GIVING THE WHOLE NUMBER OF PERSONS IN EACH STATE, EXCLUSIVE OF INDIANS NOT TAXED, AS ASCERTAINED UNDER THE FIFTEENTH DECENNIAL CENSUS OF POPULATION.

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December 5, 1930.—Referred to the Committee on the Census and ordered to be printed.

To the Congress of the United States:

In compliance with the provisions of section 22 (a) of the act approved June 18, 1929, I transmit herewith a statement prepared by the Bureau of Census, Department of Commerce, giving the whole number of persons in each State, exclusive of Indians not taxed, as ascertained under the Fifteenth Decennial Census of population, and the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives by the method known as the method of major fractions, which was the method used in the last preceding apportionment, and also by the method known as the method of equal proportions.

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HERBERT HOOVER.

THE WHITE HOUSE,
December 4, 1930.

Exhibit "B".

BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE

Apportionment of 435 Representatives by the method of major fractions, which was used in the last preceding apportionment, and by the method of equal proportions, with total population of the several States, number of Indians not taxed, and population basis of apportionment.

State	Population as enumerated Apr. 1, 1930	Indians not taxed	Population basis of apportionment	Apportionment of 435 Representatives by method of— Major fractions used in last preceding apportionment	Apportionment of 435 Representatives by method of— Equal proportions
Total	122,288,177	194,722	122,093,455	435	435
Alabama	2,646,248	6	2,646,242	9	9
Arizona	435,573	46,198	389,375	1	1
Arkansas	1,854,482	38	1,854,444	7	7
California	5,677,251	9,010	5,668,241	20	20
Colorado	1,035,791	942	1,034,849	4	4
Connecticut	1,606,903	6	1,606,897	6	6
Delaware	238,380	.....	238,380	1	1
Florida	1,468,211	20	1,468,191	5	5
Georgia	2,908,506	60	2,908,446	10	10
Idaho	445,032	3,496	441,536	2	2
Illinois	7,630,654	266	7,630,388	27	27
Indiana	3,238,503	23	3,238,480	12	12
Iowa	2,470,939	519	2,470,420	9	9
Kansas	1,880,999	1,501	1,879,498	7	7
Kentucky	2,614,589	14	2,614,575	9	9
Louisiana	2,101,593	.....	2,101,593	8	8
Maine	797,423	5	797,418	3	3
Maryland	1,631,526	4	1,631,522	6	6
Massachusetts	4,249,614	16	4,249,598	15	15
Michigan	4,842,325	273	4,842,052	17	17
Minnesota	2,563,953	12,370	2,551,583	9	9
Mississippi	2,009,821	1,667	2,008,154	7	7
Missouri	3,629,367	257	3,629,110	13	13
Montana	537,606	12,877	524,729	2	2
Nebraska	1,377,963	2,840	1,375,123	5	5
Nevada	91,058	4,668	86,390	1	1
New Hampshire	465,293	1	465,292	2	2
New Jersey	4,041,334	15	4,041,319	14	14
New Mexico	423,317	27,335	395,982	1	1
New York	12,588,066	99	12,587,967	45	45
North Carolina	3,170,276	3,002	3,167,274	11	11
North Dakota	680,845	7,505	673,340	2	2

Exhibit "B".

Ohio	6,646,697	64	6,646,633	24	24
Oklahoma	2,396,040	13,818	2,382,222	9	9
Oregon	953,786	3,407	950,379	3	3
Pennsylvania	9,631,350	51	9,631,299	34	34
Rhode Island	687,497	.....	687,497	2	2
South Carolina	1,738,765	5	1,738,760	6	6
South Dakota	692,849	19,844	673,005	2	2
Tennessee	2,616,556	59	2,616,497	9	9
Texas	5,824,715	114	5,824,601	21	21
Utah	507,847	2,106	505,741	2	2
Vermont	359,611	.....	359,611	1	1
Virginia	2,421,851	22	2,421,829	9	9
Washington	1,563,396	10,973	1,552,423	6	6
West Virginia	1,729,205	6	1,729,199	6	6
Wisconsin	2,939,006	7,285	2,931,721	10	10
Wyoming	225,565	1,935	223,630	1	1

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105

106 **Exhibit "C".**

HOUSE OF REPRESENTATIVES

CLERK'S OFFICE * * * WASHINGTON, D. C.

I, WM. TYLER PAGE, Clerk of the House of Representatives of the United States, hereby certify, pursuant to Section 22, Subdivision (B), of the Act of the Congress of the United States of America entitled "An Act to Provide for the Fifteenth and Subsequent Decennial Censuses and to Provide for Apportionment of Representatives in Congress", approved June 18, 1929, that the State of
107 New York shall be entitled, in the Seventy-third Congress and in each Congress thereafter until the taking effect of a reapportionment under said act or subsequent statute, to Forty-five Representatives in the House of Representatives of the Congress of the United States.

IN WITNESS WHEREOF I hereto affix my name and the seal of the House of Representatives of the United States of America this fourth day of March, anno domini 1931, in the City of Washington, District of Columbia.

108 (Signed) WM. TYLER PAGE
Clerk of the House of Representatives
of the United States.

(SEAL)

"House of Representatives
United States"

Exhibit "D".

STATE OF NEW YORK

IN SENATE

ALBANY, *April* 10, 1931

BY MR. CAMPBELL:

CONCURRENT RESOLUTION of the senate and assembly, constituting the legislature of the state of New York, subdividing the state of New York into forty-five congressional districts and defining the boundaries thereof.

The state of New York having become entitled to forty-five representatives in the house of representatives of the congress of the United States, pursuant to an act of congress approved June 18, 1929, entitled "An act to provide for the fifteenth and subsequent decennial censuses and to provide for the apportionment of representatives in congress," now therefore

RESOLVED (if the Assembly concur), That the representatives from such state in the house of representatives of the congress of the United States shall be chosen in the several congressional districts at the general election held therein in every even numbered year, that they shall be so chosen in the congressional districts as constituted by the legislature by this resolution, and not otherwise, except as the congressional districts, by action hereafter taken by the legislature, by bill or resolution, or action hereafter taken pursuant to the federal constitution, may be lawfully altered or otherwise consti-

112 *Exhibit "D".*

tuted, and that the legislature of such state by this resolution hereby subdivides such state into forty-five congressional districts, and hereby constitutes them as follows, with the following boundaries and descriptions:

First district. The counties of Suffolk and Richmond, as at present constituted, shall compose the first district.

Second district. The county of Nassau, as at present constituted, shall compose the second dis-
113 trict.

Third district. That part of the county of Queens, within and bounded by a line beginning at a point on a line dividing Nassau and Queens counties at Foch boulevard; thence along Foch boulevard to Two Hundred and Fourth street; thence along Two Hundred and Fourth street to Atlantic avenue; thence along Atlantic avenue to a line dividing Kings and Queens counties; thence along the said boundary line between Kings and Queens counties through Jamaica bay to Atlantic ocean and Rockaway inlet to the intersection of the
114 boundary line between Queens and Nassau counties; thence along the boundary line between Queens and Nassau counties to Foch boulevard to the point or place of beginning, shall compose the third district.

Fourth district. That part of the county of Queens, within and bounded by a line beginning at a point on a line dividing Kings and Queens counties at Atlantic avenue; thence along said boundary line between Kings and Queens counties to Park

lane; thence along Park lane to Woodhaven boulevard; thence along Woodhaven boulevard to Yellowstone boulevard; thence along Yellowstone boulevard to Sixty-ninth drive; thence along sixty-ninth drive to One Hundred and Thirtieth street; thence along One Hundred and Thirtieth street to Union turnpike; thence along Union turnpike to Hollis Court boulevard; thence along Hollis Court boulevard to Forty-sixth avenue; thence along Forty-sixth avenue to One Hundred and Forty-seventh street; thence along One Hundred and Forty-seventh street to Bayside avenue; thence 116
along Bayside avenue to Twenty-ninth avenue; thence along Twenty-ninth avenue to Bayside lane; thence along Bayside lane to Twenty-sixth avenue (formerly Poppenhausen avenue); thence along Twenty-sixth avenue to Bell boulevard; thence along Bell boulevard to Twenty-third avenue; thence along Twenty-third avenue prolonged to the waters of Little Neck bay; thence through the waters of Little Neck bay to the boundary line between Queens and Nassau counties; thence along the boundary line between Queens and Nassau counties to Foch boulevard; thence along Foch boulevard to Two Hundred and Fourth street; 117
thence along Two Hundred and Fourth street to Atlantic avenue; thence along Atlantic avenue to the boundary line between Queens and Kings counties to the point or place of beginning, shall compose the fourth district.

Fifth district. That part of the county of Queens, within and bounded by a line beginning at a point being the intersection of Little Neck bay where same is intersected by Twenty-third avenue prolonged; thence along Twenty-third avenue to Bell

boulevard; thence along Bell boulevard to Twenty-sixth avenue (formerly Poppenhausen avenue); thence along Twenty-sixth avenue to Bayside lane; thence along Bayside lane to Twenty-ninth avenue; thence along Twenty-ninth avenue to Bayside avenue; thence along Bayside avenue to One Hundred and Forty-seventh street; thence along One Hundred and Forty-seventh street to Forty-sixth avenue; thence along Forty-sixth avenue to Hollis Court boulevard; thence along Hollis Court boulevard to Union turnpike; thence along Union turnpike to One Hundred and Thirtieth street; thence
119 along One Hundred and Thirtieth street to Sixty-ninth drive; thence along Sixty-ninth drive to Yellowstone boulevard; thence along Yellowstone boulevard to Woodhaven boulevard; thence along Woodhaven boulevard to the Montauk division of the Long Island railroad; thence along the Montauk division of the Long Island railroad to Maurice avenue; thence along Maurice avenue to Calamus avenue; thence along Calamus avenue to Sixty-ninth street; thence along Sixty-ninth street to Woodside avenue; thence along Woodside avenue to Fifty-first street; thence along Fifty-first street to Thirtieth avenue; thence along Thirtieth
120 avenue to Forty-third street; thence along Forty third street as prolonged to Bowery bay; thence through the waters of Bowery bay, East river and Little Neck bay to Twenty-third avenue as prolonged to the point or place of beginning, shall compose the fifth district.

Sixth district. That part of the county of Queens, within and bounded by a line beginning at a point in the waters of Bowery bay where the same is interested by Forty-third street prolonged;

thence along Forty-third street to Thirtieth avenue; thence along Thirtieth avenue to Fifty-first street; thence along Fifty-first street to Woodside avenue; thence along Woodside avenue to Sixty-ninth street; thence along Sixty-ninth street to Calamus avenue; thence along Calamus avenue to Maurice avenue; thence along Maurice avenue to the Montauk division of the Long Island railroad; thence along the Montauk division of the Long Island railroad to Woodhaven boulevard; thence along Woodhaven boulevard to Park lane; thence along Park lane to the boundary line between Kings and Queens counties; thence along said boundary line between Kings and Queens counties and through the waters of Newtown creek, East river and Bowery bay to Forty-third street prolonged, to the point or place of beginning, shall compose the sixth district. 122

Seventh district. That part of the county of Kings, within and bounded by a line beginning at the junction of the East river and Newtown creek and thence through the waters of Newtown creek to the boundary lines of Kings and Queens counties, thence along said boundary lines, to Flushing avenue, to Broadway, to Lexington avenue, to Stuyvesant avenue, to Lafayette avenue, to Nostrand avenue, to Lee avenue, to Division avenue, to East river, thence along the East river, to Newtown creek, to point of beginning, shall compose the seventh district. 123

Eighth district. That part of the county of Kings, within and bounded by a line beginning at the intersection of the boundary line of Kings and Queens counties and Flushing avenue at Cypress avenue, running thence along said boundary line of Kings

and Queens counties, to waters of Jamaica bay and through said waters of Jamaica bay to Pennsylvania avenue, to Blake avenue, to Williams avenue, to Fulton street, to Broadway, to Flushing avenue, and thence along Flushing avenue, to point of beginning, shall compose the eighth district.

Ninth district. That part of the county of Kings within and bounded by a line beginning at the intersection of Gravesend avenue and Foster avenue, thence running along Foster avenue to Coney Island avenue, to Avenue J, to Schenectady avenue, to
125 Clarendon road, to Ditmas avenue, to Rockaway avenue, to Linden boulevard, to Pennsylvania avenue, to the waters of Jamaica bay, to the boundary line of Kings and Queens counties, along said boundary line to a point east of Duck point marsh, thence southerly and westerly through the waters of Jamaica bay, Rockaway inlet, Atlantic ocean and Sheepshead bay to Shore boulevard, Neptune avenue, to Ocean parkway, to Avenue L, to Gravesend avenue, to the point of beginning, shall compose the ninth district.

Tenth district. That part of the county of Kings
126 within and bounded by a line beginning at the junction of Fort Hamilton parkway and Gravesend bay, thence along Fort Hamilton parkway, to Eighty-sixth street, to Twelfth avenue, to Forty-second street, to Thirteenth avenue, to Forty-first street to Fourteenth avenue, to Church avenue, to Coney Island Avenue, to Foster avenue, to Gravesend avenue, to Avenue L, to Ocean parkway, to Neptune avenue, to Shore boulevard, to the waters of Sheepshead bay, Atlantic ocean, Gravesend bay, to Fort Hamilton parkway, to the point of beginning, shall compose the tenth district.

Exhibit "D".

Eleventh district. That part of the county of Kings within and bounded by a line beginning at the junction of New York bay and Forty-second street, thence along Forty-second street to Fourth avenue, to Thirty-fifth street, to Fifth avenue, to Lincoln place, to Eighth avenue, to Second street, to Prospect park west, to Prospect park southwest, to Coney Island avenue, to Church avenue, to Fourteenth avenue, to Forty-first street, to Thirteenth avenue, to Forty-second street, to Twelfth avenue, to Eighty-sixth street, to Fort Hamilton parkway, to the waters of Gravesend bay and thence through the waters of Gravesend bay, the Narrows, New York bay, to Forty-second street, to point of beginning, shall compose the eleventh district.

Twelfth district. That part of the county of Kings within and bounded by a line beginning at the junction of East river and Wallabout channel, and thence through the waters of Wallabout channel, to Division avenue, and thence along Division avenue, to Lee avenue, to Nostrand avenue, to Willoughby avenue, to Washington park or Cumberland street, to Dekalb avenue, to Ashland place, to Flatbush avenue, to Fifth avenue, to Thirty-fifth street, to Fourth avenue, to Forty-second street, to the waters of New York bay and thence through the waters of New York bay, Buttermilk channel, East river and Wallabout channel to point of beginning, shall compose the twelfth district.

Thirteenth district. That part of the county of Kings within and bounded by a line beginning at the intersection of Washington park or Cumberland street and Willoughby avenue, running thence along Willoughby avenue, to Nostrand avenue, to

Lafayette avenue, to Stuyvesant avenue, to Lexington avenue, to Broadway, to Saratoga avenue, to Chauncey street, to Fulton street, to Troy avenue, to Herkimer street, to New York avenue, to Atlantic avenue, to Classon avenue, to President street, to Franklin avenue, to Washington avenue, to Sterling street, to Rogers avenue, to Avenue D, to East Twenty-ninth street, to Farragut road, to East Thirty-eighth street, to Glenwood road, to East Thirty-ninth street, to Avenue J, to Coney Island avenue, to Prospect park southwest, to Prospect park west, to Second street, to Eighth avenue, to Lincoln palce, to Fifth avenue, to Flatbush avenue, to Ashland place, to Dekalb avenue, to Washington park or Cumberland street, to point of beginning, shall compose the thirteenth district.

Fourteenth district. That part of the county of Kings within and bounded by a line beginning at the intersection of Classon avenue and Atlantic avenue and thence along Atlantic avenue, to New York avenue, to Herkimer street, to Troy avenue, to Fulton street, to Chauncey street, to Saratoga avenue, to Broadway, to Fulton street, to Williams avenue, to Blake avenue, to Pennsylvania avenue, to Linden boulevard, to Rockaway avenue, to Ditmas avenue, to Clarendon road, to Schenectady avenue, to Avenue J, to East Thirty-ninth street, to Glenwood road, to East Thirty-eighth street, to Farragut road, to East Twenty-ninth street, to Avenue D. to Rogers avenue, to Sterling street, to Washington avenue, to Franklin avenue, to President street, to Classon avenue, to point of beginning, shall compose the fourteenth district.

Fifteenth district. That part of the county of New York within and bounded by a line beginning

at the Hudson river and West Sixty-third street, thence easterly along West Sixty-third street to Columbus avenue, along Columbus and Ninth avenues to West Fifty-seventh street, along West Fifty-seventh street to Eighth avenue, along Eighth avenue to West Thirty-seventh street, along West Thirty-seventh street to Seventh avenue, along Seventh avenue to Greenwich avenue, along Greenwich avenue to Sixth avenue, along Sixth avenue to West Third street, along West Third street to Great Jones street, along Great Jones street to East Third street, along East Third street to Second avenue, 134
along Second avenue to East Houston street, along East Houston street to Avenue D, along Avenue D to East Third street, along East Third street to East river, along East river and around the southerly end of Manhattan island, to the Hudson river and along the Hudson river to West Sixty-third street, the point or place of beginning, and Bedloe's Island, Governor's Island and Ellis Island, shall compose the fifteenth district.

Sixteenth district. That part of the county of New York within and bounded by a line beginning at the East river and East Third street, thence 135
westerly along East Third street to Avenue D, along Avenue D to East Houston street, along East Houston street to Second avenue, along Second Avenue to East Third street, along East Third street to the Bowery, along the Bowery and Fourth avenue to East Eighteenth street, along East Eighteenth street to Third avenue, along Third avenue to East Twenty-third street, along East Twenty-third street to Lexington avenue, along Lexington avenue to East Thirty-fourth street, along East Thirty-fourth street to Third avenue, along Third

avenue to East Fortieth street, along East Fortieth street to Lexington avenue, along Lexington avenue to East Fifty-ninth street, along East Fifty-ninth street to Third avenue, along Third avenue to East Seventy-third street, along East Seventy-third street to Lexington avenue, along Lexington avenue to East Ninety-sixth street, along East Ninety-sixth street to Park avenue, along Park avenue to East Ninety-ninth street, along East Ninety-ninth street to the East river, along the East river to East Third street, the point or place of beginning,
137 and all of Blackwell's Island (Welfare Island), shall compose the sixteenth district.

Seventeenth district. That part of the county of New York within and bounded by a line beginning at the Hudson river and West Sixty-third street, thence easterly along West Sixty-third street to Columbus avenue, along Columbus and Ninth avenues to West Fifty-seventh street, along West Fifty-seventh street to Eighth avenue, along Eighth avenue to West Thirty-seventh street, along West Thirty-seventh street to Seventh avenue, along Seventh avenue to Greenwich avenue, along
138 Greenwich avenue to Sixth avenue, along Sixth avenue to West Third street, along West Third street to Great Jones street; along Great Jones street to the Bowery, along the Bowery and Fourth avenue to East Eighteenth street, along East Eighteenth street to Third avenue, along Third avenue to East Twenty-third street, along East Twenty-third street to Lexington avenue, along Lexington avenue to East Thirty-fourth street, along East Thirty-fourth street to Third avenue, along Third avenue to East Fortieth street, along East Fortieth street to Lexington avenue, along Lexington ave-

nue to East Fifty-ninth street, along East Fifty-ninth street to Third avenue, along Third avenue to East Seventy-third street, along East Seventy-third street to Lexington avenue, along Lexington avenue to East Ninety-sixth street, along East Ninety-sixth street to Park avenue, along Park avenue to East Ninety-ninth street, along East Ninety-ninth street to Fifth avenue, along Fifth avenue to East Ninety-seventh street, thence across and through Central Park Transverse Road to West Ninety-seventh street, and Central Park West, along Central Park West to West Eighty-sixth street, along West Eighty-sixth street to Amsterdam avenue, along Amsterdam avenue to West Ninety-fifth street, along West Ninety-fifth street to the Hudson river and along the Hudson river to West Sixty-third street, the point or place of beginning, shall compose the seventeenth district.

Eighteenth district. That part of the county of New York within and bounded by a line beginning at the Hudson river and West One Hundred and Twenty-fifth street, thence running along easterly on West One Hundred and Twenty-fifth street, along West and East One Hundred and Twenty-fifth street to Park avenue, along Park avenue to East Ninety-ninth street, along East Ninety-ninth street to Fifth avenue, along Fifth avenue to East Ninety-seventh street, thence across and through Central Park Transverse Road to West Ninety-seventh street and Central Park West, along Central Park West to West Eighty-sixth street, along West Eighty-sixth street to Amsterdam avenue, along Amsterdam avenue to West Ninety-fifth street, along West Ninety-fifth street to the Hudson river, along the Hudson river to West One Hundred and

142 *Exhibit "D".*

Twenty-fifth street, the point or place of beginning, shall compose the eighteenth district.

Nineteenth district. That part of the county of New York within and bounded by a line beginning at the Hudson river and West One Hundred and Twenty-fifth street, thence running along easterly on West One Hundred and Twenty-fifth street to Seventh avenue, along Seventh avenue to West One Hundred and Thirty-sixth street, along West One Hundred and Thirty-sixth street to St. Nicholas
143 avenue, along St. Nicholas avenue to West One Hundred and Fifty-fifth street, along West One Hundred and Fifty-fifth street to Eighth avenue, along Eighth avenue to the Harlem river, along the Harlem river and Ship Canal to the boundary line between New York and Bronx counties, along said boundary line between New York and Bronx counties to the Hudson river, along the Hudson river to West One Hundred and Twenty-fifth street, the point or place of beginning, shall compose the nineteenth district.

Twentieth district. That part of the county of New York within and bounded by a line beginning
144 at East Ninety-ninth street, thence westerly along East Ninety-ninth street to Park avenue, along Park avenue to East One Hundred and Twenty-fifth street, along East and West One Hundred and Twenty-fifth street to Seventh avenue, along Seventh avenue to West One Hundred and Thirty-sixth street, along West One Hundred and Thirty sixth street to St. Nicholas avenue, along St. Nicholas avenue to West One Hundred and Fifty-fifth street, along West One Hundred and Fifty-fifth street to Eighth avenue, along Eighth avenue to the

Harlem river, along the Harlem river to Bronx Kills, to the East river, along the East river to East Ninety-ninth street, the point or place of beginning and Wards Island, Randalls Island and Sunken Meadow, shall compose the twentieth district.

Twenty-first district. That part of the county of Bronx, within the following boundaries: Beginning at the Harlem river and West Tremont avenue, thence along West Tremont avenue to East Tremont avenue, to Anthony avenue, to East One 146
Hundred and Seventy-sixth street, to East Tremont avenue, to Park avenue, to East One Hundred and Seventy-fifth street, to Washington avenue, to East One Hundred and Sixty-sixth street, to Third avenue, to East One Hundred and Sixty-third street, to Cauldwell avenue, to East One Hundred and Fifty-sixth street, to Saint Anns avenue, to East One Hundred and Forty-first street, to Brook avenue, to East One Hundred and Thirty-second street, to Lincoln avenue, to the Harlem river, thence along the Harlem river to West Tremont avenue, the point or place of beginning, shall compose the twenty-first district. 147

Twenty-second district. That part of the county of Bronx, within the following boundaries: Beginning at the intersection of Washington avenue and East One Hundred and Seventy-fifth street, thence along East One Hundred and Seventy-fifth street to Arthur avenue, to Crotona Park North, to East One Hundred and Seventy-fifth street, to Boston road, to Hoe avenue, to East One Hundred and Seventy-fourth street, to the Bronx river, thence along the Bronx river to the East river, to the Bronx

148 *Exhibit "D".*

Kills, to the Harlem river, to Lincoln avenue, to East One Hundred and Thirty-second street, to Brook avenue, to East One Hundred and Forty-first street, to Saint Anns avenue, to East One Hundred and Fifty-sixth street, to Cauldwell avenue, to East One Hundred and Sixty-third street, to Third avenue, to East One Hundred and Sixty-third street, to Washington avenue, thence along Washington avenue to East One Hundred and Seventy-fifth street, the point or place of beginning, and the North Brother Island, South Brother Island and Riker's Island, shall compose the twenty-
149 second district.

Twenty-third district. That part of the county of Bronx, within the following boundaries: Beginning at the Hudson river and the northerly boundary line of the city of New York, thence easterly along the said northerly boundary line of the city of New York to the Bronx river, to Fordham road, to Southern boulevard, to East One Hundred and Eightieth street, to Crotona avenue, to Crotona Park North, to Arthur avenue, to East One Hundred and Seventy-fifth street, to Park avenue, to East Tremont avenue, to East One Hundred and
150 Seventy-sixth street, to Anthony avenue, to East Tremont avenue, to West Tremont avenue, to the Harlem river, along the Harlem river to Spuyten Duyvil creek, through the waters of the Spuyten Duyvil creek to the Hudson river, along the boundary line of New York and Bronx counties, along the Hudson river to the northern boundary line of the city of New York, the point or place of beginning, shall compose the twenty-third district.

Twenty-fourth district. That part of the county of Bronx, within the following boundaries: Begin-

ning at the Bronx river and the northerly boundary line of the city of New York, thence easterly along the said northerly boundary line of the city of New York to the Long Island sound, to the East river, to the Bronx river, to East One Hundred and Seventy-fourth street, to Hoe avenue, to Boston road, to East One Hundred and Seventy-fifth street, to Crotona Park North, to Crotona avenue, to East One Hundred and Eightieth street, to Southern boulevard, to Fordham road, to the Bronx river, along the Bronx river to the northerly boundary line of the city of New York, the point or place of 152
beginning, and City island, Hunter island, Harts island, Twin island, High island, Middle Reef island, the Blauzes, and Chimney sweep, shall compose the twenty-fourth district.

Twenty-fifth district. That part of the county of Westchester, included in the town of Rye, city of White Plains, town of Scarsdale, town of Mamaroneck, town of Harrison, city of New Rochelle, town of Pelham, town of Eastchester and city of Mount Vernon, as at present constituted, shall compose the twenty-fifth district.

Twenty-sixth district. That part of the county of 153
Westchester, included in the town of Bedford, town of Cortlandt, town of Greenburg, town of Lewisboro, town of Mount Pleasant, town of New Castle, town of North Castle, town of North Salem, town of Ossining, town of Poundridge, town of Somers, city of Yonkers and town of Yorktown, as at present constituted, shall compose the twenty-sixth district.

Twenty-seventh district. The counties of Dutchess, Orange, Putnam, and Rockland, as at present

constituted, shall compose the twenty-seventh district.

Twenty-eighth district. The counties of Columbia, Green, Sullivan, Schoharie and Ulster, as at present constituted, shall compose the twenty-eighth district.

Twenty-ninth district. The county of Albany, as at present constituted, shall compose the twenty-ninth district.

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Thirtieth district. The counties of Rensselaer, Saratoga, Warren and Washington, as at present constituted, shall compose the thirtieth district.

Thirty-first district. The counties of Fulton, Hamilton, Montgomery and Schenectady, as at present constituted, shall compose the thirty-first district.

Thirty-second district. The counties of Clinton, Essex, Franklin and Saint Lawrence, as at present constituted, shall compose the thirty-second district.

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Thirty-third district. The counties of Jefferson, Lewis, Madison and Oswego, as at present constituted, shall compose the thirty-third district.

Thirty-fourth district. The counties of Herkimer and Oneida, as at present constituted, shall compose the thirty-fourth district.

Thirty-fifth district. The counties of Broome, Chenango, Delaware and Otsego, as at present constituted, shall compose the thirty-fifth district.

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Thirty-sixth district. The county of Onondaga, as at present constituted, shall compose the thirty-sixth district.

Thirty-seventh district. The counties of Cayuga, Cortland, Ontario, Seneca, Wayne and Yates, as at present constituted, shall compose the thirty-seventh district.

Thirty-eighth district. The counties of Chemung, Schuyler, Steuben, Tioga and Tompkins, as at present constituted, shall compose the thirty-eighth district. 158

Thirty-ninth district. That part of the county of Monroe, included within the boundaries of the fourth, sixth, seventh, eighth, twelfth, thirteenth, sixteenth, seventeenth, eighteenth, twenty-first and twenty-second wards of the city of Rochester, and the towns of Brighton, Henrietta, Irondequoit, Mendon, Penfield, Perinton, Pittsford, Rush and Webster, as at present constituted, shall compose the thirty-ninth district.

Fortieth district. That part of the county of Monroe, included within the boundaries of the first, second, third, fifth, ninth, tenth, eleventh, fourteenth, fifteenth, nineteenth, twentieth, twenty-third and twenty-fourth wards of the city of Rochester and the towns of Chili, Clarkson, Gates, Greece, Hamlin, Ogden, Parma, Riga, Sweden and Wheatland, as at present constituted, shall compose the fortieth district. 159

Forty-first district. The counties of Genessee, Livingston, Niagara, Orleans and Wyoming, as at

present constituted, shall compose the forty-first district.

Forty-second district. That part of the county of Erie, included within the boundaries of the towns of Grand Island, Tonawanda, the city of Tonawanda and that part of the eighteenth ward west of Main street, the nineteenth ward complete, that part of the twentieth ward west of Main street, the twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth and twenty-seventh wards of the city of Buffalo, as at
161 present constituted, shall compose the forty-second district.

Forty-third district. That part of the county of Erie included within the boundaries of the towns of Alden, Amherst, Aurora, Clarence, Colden, Concord, Elma, Holland, Lancaster, Marilla, Newstead, Sardinia and Wales, and the ninth, tenth, eleventh, twelfth, thirteenth fourteenth, fifteenth, sixteenth, seventeenth, and all that part of the eighteenth and twentieth wards lying east of Main street, of the city of Buffalo, as at present constituted, shall compose the forty-third district.

162 *Forty-fourth district.* That part of the county of Erie, included within the boundaries of the towns of Boston, Brant, Cheektowaga, Collins, East Hamburg, Eden, Evans, Hamburg, North Collins and West Seneca, the city of Lackawanna, and the first, second, third, fourth, fifth, sixth, seventh and eighth wards of the city of Buffalo, as at present constituted, shall compose the forty-fourth district.

Forty-fifth district. The counties of Allegany, Cattaraugus and Chautauqua, as at present constituted, shall compose the forty-fifth district.

Exhibit "D".

BE IT FURTHER RESOLVED, that the words "assembly district" when used in this resolution refers to assembly districts as at present constituted; and that whenever the word or words "town," "towns," "ward," "wards," "election district" or "election districts" is or are used in this resolution it or they shall be understood to refer to the town, towns, ward, wards, election district or election districts as constituted at the time of the adoption of this resolution.

BE IT FURTHER RESOLVED, that the respective boards of canvassers in the state of New York, beginning with the canvass of the results of the votes cast at the general election in the year 1932, in canvassing results of the votes cast for representatives in congress, pursuant to the election law as now or hereafter in force, shall canvass the results of the votes cast for such officers within the several congressional districts as constituted by this resolution, or as hereafter altered or constituted as set forth in this resolution, and not otherwise; also that a board of elections or officer charged by the election law, as now or hereafter in force, with the duty of certifying the results of the canvass of the vote cast for representative in congress, beginning with the vote cast at such general election, shall certify the vote so cast in a congressional district as the same is constituted by this resolution, or as hereafter altered or constituted as set forth in this resolution, and not otherwise; also that such board of elections or officer, in addition to certifying the result of such canvass in any such congressional district as required by the election law, shall certify the same to the house of representatives of the United States, and transmit the

166 *Exhibit "D".*

same to the clerk of the house of representatives at its first meeting; also that it shall be the duty of the secretary of state of the state of New York, or of the state officer or department succeeding generally to his powers and duties, to prepare a general certificate under the seal of the state and attested by him in his official capacity, addressed to the house of representatives of the United States, in that congress for which any person shall have been chosen, of the due election of all persons chosen at that election as representatives of this
167 state in congress who were so elected in the several congressional districts as constituted by this resolution, or as hereafter altered or constituted as set forth in this resolution, and not otherwise, and to transmit the same to the clerk of the house of representatives at its first meeting; and that the provisions of the election law, in so far as they are not inconsistent herewith, relating to the election of representatives from this state in congress, to fill vacancies by expiration of term or otherwise occurring or existing after the general election in the year 1932, shall continue in force until repealed, superseded or amended.

168 BE IT FURTHER RESOLVED, that the subdivision of the state of New York congressional districts as provided by this resolution shall be deemed to be in effect at such time prior to the general election of 1932 as shall be necessary for the purposes of nominating representatives in congress to be chosen in such districts at the general election in 1932, of nominating party candidates for the office of elector of president and vice-president of the United States to be chosen at such election, and of nominating and electing delegates and alternates to national party conventions in the year 1932.

Exhibit "D".

BE IT FURTHER RESOLVED, that the adoption of this resolution be certified by the presiding officer of each house of the legislature, and this resolution, with such certificate appended thereto, shall be deposited with the secretary of state of the state of New York.

BE IT FURTHER RESOLVED, that a copy of this resolution, including a copy of the certificate of its adoption, be certified by the respective clerks of the senate and assembly of the state of New York and be transmitted by them to the clerk of the house of representatives.

BY ORDER OF THE SENATE

A. MINER WELLMAN,
Clerk.

In Assembly, *April* 10th, 1931,
Concurred in without amendment,
By Order of the Assembly,
FRED W. HAMMOND, *Clerk.*

172 *Exhibit "D".*

STATE OF NEW YORK

April 10, 1931

IN SENATE

The foregoing resolution was duly passed, a majority of all the Senators elected voting in favor thereof.

By order of the Senate

173 HERBERT H. LEHMAN,
President.

STATE OF NEW YORK

April 10, 1931

IN ASSEMBLY

The foregoing resolution was duly passed, a majority of all the members elected to the Assembly voting in favor thereof.

174

By order of the Assembly

J. A. MCGINNIES,
Speaker.

Answer of Respondent. 175

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER
of
The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order
against
EDWARD J. FLYNN, Secretary of State of the State of New York.

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Edward J. Flynn, Secretary of State of the State of New York, by John J. Bennett, Jr., Attorney General of the State of New York, answers to the petition herein as follows:

1. Denies each and every allegation contained in paragraphs "Third", "Seventh", "Twelfth", "Thirteenth" and "Sixteenth" of the petition herein except that the respondent, Secretary of State of the State of New York, admits 177

(a) as to paragraph "Third" of the petition that the Federal provisions as to Congressional Reapportionment are regulated by the Act of Congress of August 8th, 1911, and the Act of Congress of June 18th, 1929, which said Acts are now in full force and effect;

(b) as to paragraph "Seventh" of the petition that the so-called Concurrent Resolution

of the Senate and Assembly of the State of New York, annexed to the petition as "Exhibit D" was adopted in the form pleaded in the petition.

FOR A FIRST AND SEPARATE DEFENSE TO THE PETITION HEREIN.

2. Admits, upon information and belief, each and every allegation contained in paragraphs "First", "Second", "Fourth", "Fifth", "Sixth", "Eighth", "Ninth", "Tenth", "Eleventh", "Fourteenth", and "Fifteenth" of the petition herein and the said paragraphs are hereby repeated and made a part of this defense with the same force and effect as if herein fully set forth at length, and further

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(a) Referring to paragraph "Eleventh" of the petition, there is annexed hereto as "Exhibit 1", the opinion of the Attorney General of New York State, dated August 4, 1931, mentioned in said paragraph "Eleventh" of the petition but not therein set forth, and which said opinion is incorporated herein and made part hereof as if here set forth at length.

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3. That by Article 1, Section 4, of the Constitution of the United States it is provided:

"The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations except as to places chusing Senators."

4. Pursuant thereto and on the eighth day of August, 1911, the Congress of the United States

provided by law for the choosing of Representatives, more particularly by Section 3 thereof, as follows:

> "SEC. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which 182
> such State may be entitled in Congress, no district electing more than one Representative.";

and by Section 4 thereof, as follows:

> "SEC. 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no 183
> change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed."

5. That on or about the thirtieth day of June, 1926, the Congress of the United States enacted a law effecting the codification and consolidation of the general and permanent laws of the United

184 *Answer of Respondent.*

States in force December 7th, 1925, in which said codification of the laws the provisions of the Act of August 8th, 1911, are substantially repeated in words as follows:

Section 3. "ELECTION BY DISTRICTS.—In each State entitled under this apportionment to more than one Representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The
185 said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative."

Section 4. "ADDITIONAL REPRESENTATIVES AT LARGE.—In case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts prescribed by law on August 8, 1911, until such State shall be redistricted in the manner provided by the laws thereof and
186 in accordance with the rules enumerated in section 3; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts prescribed by law on August 8, 1911, until such State shall be redistricted as herein prescribed."

Copy of the Enacting Clause of said Statute, Chapter 713, 44 Stat. 773, is annexed hereto and marked "Exhibit 2" and made a part hereof as if herein fully set forth.

6. By Chapter 890 of the Laws of 1911, the Legislature of the State of New York duly enacted a general law redistricting the State of New York and dealing with future redistricting pursuant to future Congressional Reapportionments, which said Chapter has been amended by Chapter 340 of the Laws of 1915, Chapters 797 and 799 of the Laws of 1917, Chapters 34 and 250 of the Laws of 1918 and Chapter 636 of the Laws of 1922, but otherwise it has not been amended nor repealed, and it is now in full force and effect.

7. Under the Constitution of the State of New 188
York no law may be enacted except by bill, nor shall any bill be passed or become a law except with the assent of the majority of the members elected to the Senate and Assembly, and no bill shall be enacted into law until approved by the Governor or unless passed by the respective houses of the Legislature of the State of New York by a two-thirds vote after a veto by the Governor; that a Joint Resolution of the Senate and the Assembly may be adopted by the assent of the majority of a quorum of the members elected to each branch of the State Legislature; does not need the approval of the Governor as such and said Joint Resolution 189
without the approval of the Governor is wholly ineffective to amend or repeal a statute theretofore enacted into law.

8. On April 10th, 1931, the Senate and Assembly of the State of New York adopted a so-called Concurrent Resolution, copy of which is annexed to the petition herein and marked "Exhibit D", which said Concurrent Resolution was not submitted to the Governor of the State of New York for approval, nor was it approved by him.

190 *Answer of Respondent.*

9. The so-called Concurrent Resolution of April 10th, 1931, was and is wholly ineffective to amend or repeal Chapter 890 of the Laws of 1911 as amended, or any other law then (on April 10, 1931) operative in the State of New York.

FOR A SECOND SEPARATE DEFENSE.

10. Admits, upon information and belief, each and every allegation contained in paragraphs "First", "Second", "Fourth", "Fifth", "Sixth", "Eighth", "Ninth", "Tenth", "Eleventh", "Fourteenth", and "Fifteenth" of the petition herein and repeats each of said allegations herein, and also each and every allegation of the preceding "Separate Defense" contained in paragraph "2" to "9" inclusive and the same are made a part of this defense with the same force and effect as if herein fully set forth.

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11. The so-called Concurrent Resolution of April 10th, 1931, does not redistrict the State of New York into Congressional Districts containing equal or as nearly as practicable or as nearly as may be equal numbers of inhabitants, but on the contrary, the said proposed Districts are in many instances so grossly unequal that they do not give a reasonably equal, fair or just representation in Congress to the People of the State of New York, as more fully appears by the table of districts and population hereto annexed and marked "Exhibit 3" and made a part hereof as if herein fully set forth.

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12. The so-called Concurrent Resolution does not redistrict the State into districts composed of

contiguous and compact territory as required by law, but on the contrary, in many instances the proposed districts are grossly lacking in compactness and contiguity.

13. The so-called Concurrent Resolution does not accurately or completely describe boundaries or lines of certain district or districts in a manner enabling them to be ascertained with definiteness and certainty for the purpose of holding an election.

14. The so-called Concurrent Resolution is invalid and in violation of the Act of Congress of August 8th, 1911, and of the codified laws of the said Congress of the United States.

WHEREFORE, Respondent prays that the application herein be dismissed and for such other and further relief as to the Court may be just and proper.

JOHN J. BENNETT, JR.,
Attorney General, State of New York,
Attorney for EDWARD J. FLYNN,
Secretary of State.

196 *Answer of Respondent.*

STATE OF NEW YORK, }
COUNTY OF BRONX, } ss.:

EDWARD J. FLYNN, being duly sworn, says that he is the Respondent herein and that the foregoing Answer is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EDWARD J. FLYNN.

197 Sworn to before me, this }
13 day of October, 1931. }

EDWARD C. JACKSON,
Notary Public.
Notary Public N. Y. Co. No. 7, Reg. No. 3-J-90
Cert. filed in Queens Co. No. 457, Reg. No. 7028
Cert. filed in Bronx Co. No. 15, Reg. No. 35-J-33
Cert. filed in Kings Co. No. 19, Reg. No. 3070
Certificate filed in Richmond County
Commission expires March 30, 1933
(Seal)

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Exhibit 1. 199

Aug. 4, 1931.

HONORABLE EDWARD J. FLYNN,
Secretary of State,
Albany, New York.

Re: *Congressional Reapportionment Resolution*

Dear Sir:

This will acknowledge receipt of your inquiry of June 30, 1931, in regard to the validity of the concurrent resolution of the Legislature under date of April 10, 1931. You state that since the passage 200
of that resolution a vacancy, due to death, has occurred in the Seventh Congressional District, in Kings County.

Your first inquiry is directed to the certification of the said vacancy in the Seventh Congressional District in Kings County along the lines existing prior to the passage of this resolution, or as set forth in the said resolution.

In answer to your said first inquiry, you are hereby advised that the said vacancy should be certified "along the lines which existed prior to the passage of this resolution," and not in accordance with the said concurrent resolution of April 201
10, 1931.

Your second inquiry asks whether or not the Secretary of State should certify to the Boards of Election the districts as set forth in the concurrent resolution for the prospective election of delegates to national conventions in the spring primaries.

In answer to your second inqtiiry, you are hereby advised that the certification to the Boards of Elec-

202 *Exhibit 1.*

tion of the districts for the proposed election of delegates to the national conventions should be in accordance with the said districts as in existence prior to the concurrent resolution, and that your procedure should be upon the theory that the said resolution of April 10, 1931, is ineffective.

After a careful consideration of the concurrent resolution and the history of legislative apportionment in this and other states, I have reached the conclusion that the said resolution of the Senate and the Assembly of this State of April 10, 1931,
203 is ineffectual to accomplish the purpose sought thereby, for the reason that a Congressional Reapportionment should be by legislative enactment and not by resolution; that said resolution does not have the effect of a legislative bill or law; and that the overwhelming weight of precedent is contrary to such procedure.

The reasons impelling me to these conclusions are set forth at greater length in the subjoined memorandum which I am making a part of this opinion.

1. *Reapportionment of Congressional districts should be by statute.*

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By the first clause of Section 2, Article I, of the Federal Constitution, it is provided:

> "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature;"

and by the fourth clause:

> "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

By Section 4 it is provided:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to Places of chusing Senators."

Although it is thus declared in Section 2 that "the people of the States" shall choose the members of Congress, and Congress took no action under Section 4 until 1842, most of the State legislatures in prescribing the times, places and manner of holding elections for representatives apportioned the State into districts and assigned to each a representative. In New York it was found necessary to place in the resolution ratifying the Federal Constitution what Chief Justice Fuller, in *McPherson* v. *Blacker,* 146 U. S. 1, later called a "salvo", in the form of a proviso that such ratification was upon condition that [subsequently amended to "in full confidence that"]

> "Congress will not make or alter any regulation in this State respecting the times, places and manner of holding elections for senators or representatives, unless the Legislature of this State shall neglect or refuse to

208 *Exhibit 1.*

make laws or regulations for the purpose; or from any circumstance be incapable of making the same; and that in such cases, such power will only be exercised until the Legislature of this State shall make provision in the premises."

Debates and Proceedings of the Poughkeepsie Convention, p. 141 (July 11, 1788).

In 1842, however, Congress provided that where
209 a State was entitled to more than one representative, the election should be by districts. (Act of June 25, 1842, 5 Stat. 491, ch. 47, carried forward as Section 23 of the Revised Statutes, repeated in substance in the subsequent apportionment acts until Act of August 8, 1911, ch. 5, 37 Stat. 14, and now Section 3 of the U. S. Code Annotated, title 2,) This provision read as follows:

"In each State entitled under this apportionment to more than one Representative, the Representatives in Congress shall be elected by districts composed of a contiguous and compact territory, and containing *as nearly as*
210 *practicable* an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative."

This enactment, the purpose of which was to provide uniformity and to avoid "an undue preponderance of power to the political party which had a majority of votes in the State, however small" (*Ex parte Yarbrough,* 110 U. S. 651, 660),

deprived the States of the right to regulate the "manner" in which Representatives should be elected, and likewise provided the "places", *i. e.*, districts, from which they should be elected. (Cf. Hogan, J., dissenting opinion, in *People ex rel. Fitzgerald* v. *Voorhis*, 222 N. Y. 494, at page 503). Then, by the Act of Feb. 2, 1872, ch. 11, § 3 (17 Stat. 28; R. S. § 25; March 3, 1875, ch. 130, § 6, 18 Stat. 400; U. S. Code, title 2, § 7), Congress abridged the power granted to the States to establish by law the "times" when elections for Congress should be held, fixing the same upon the 212
Tuesday next after the first Monday in November of every even numbered year.

That the power of Congress over the election of representatives, if and when exercised, is exclusive and complete, need hardly be argued. (*Ex parte Siebold*, 100 U. S. 371; *U. S.* v. *Gradwell*, 243 U. S. 476, 481.) It is true that in *Newberry* v. *United States*, 256 U. S. 232, the majority of the Supreme Court held that this power does not go so far back as to control party primaries for designating candidates for the Senate (and it may be ventured that this case is leaned upon heavily by the broad constructionists), yet Justice White, Pitney, Brandeis and Clarke were not convinced of this, and the case, 213
in any event, has nothing to do with the method by which districts shall be laid out, on which particular point the fact is that Congress has directed that it shall be done by *law*, and this has been held not to exceed the powers of Congress.

Such direction is not found specifically in the statute requiring the elections to be by districts, or in the recent legislation fixing the number of representatives to which each State is entitled. It is, however, expressly set forth in Section 4 of ch. 5

of the Act of August 8, 1911 (37 Stat. 14; U. S. Code, title 2, § 4), which provides as follows:

> "In case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts *prescribed by law on* August 8, 1911, *until such State shall be redistricted in the manner provided by the laws thereof* and in accordance with the rules enumerated in section 3;
> 215 and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from *the districts prescribed by law on August 8, 1911,* until such State shall be redistricted as herein prescribed." (Emphasis mine.)

By the act of Congress dealing with apportionment which preceded the act of 1911 (Act of February 2, 1891, ch. 116; 26 Stat. 735), the provision was that Representatives, other than additional ones, should be elected "by the districts now prescribed by law until the Legislature of such State
216 in the manner herein prescribed shall redistrict such State", and if there was no increase the Representatives should be elected "from the districts now prescribed by law until such State be redistricted as herein prescribed by the Legislature of said State."

In *Davis* v. *Ohio,* 241 U. S. 565, the words "in the manner provided by the laws thereof", in the Act of 1911, were considered in a case involving a legislative act apportioning Congress districts, which act had been submitted to the people of the State, under a constitutional provision vesting the legisla-

tive power not only in the Senate and House of Representatives of the State but also in the people by way of referendum.

Holding that where the Constitution and laws of a State made the people, by means of a referendum, a part of the lawmaking power, the submission of a redistricting act to the people was valid and was within the power of Congress to permit, the United States Supreme Court said that the provision that the redistricting should be made by a State "in the manner provided by the laws thereof" had been substituted in the Act of 1911 for the previous provision that the existing districts should continue "until the Legislature of such State in the manner herein prescribed shall redistrict such State", for the express purpose of validating such submission to a referendum, where the Constitution and laws of a State called for the same. (Compare, however, *In re Opinion of the Justices,* 254 Mass. 617, 151 N. E. 680, holding that the State referendum was not applicable to a bill to establish Congress districts.) 218

The point that stands out in *Davis* v. *Ohio,* however, is that that case goes entirely upon the basis that redistricting is a legislative power, *to be accomplished only by a law, enacted as it is required that a law be enacted,* from which it follows that a concurrent resolution, which is not a law, would not suffice. 219

An impressive contrast, which may well be determinative, is afforded by the rule which governs in the ratification of an amendment to the Constitution and in the appointment of presidential electors.

In *Hawke* v. *Smith,* 253 U. S. 221, 231 (two cases), it was held that an amendment to the Fed-

eral Constitution was not to be submitted to the people of Ohio, under the same provisions which had been held operative in regard to Congress districts in the case just cited, for the reason that the Federal Constitution gave the power of ratification to the Legislature alone, with no provision for participation therein by the people, the ratification of an amendment being *not an act of legislation,* which the process of redistricting undoubtedly was.

Of *Davis* v. *Ohio,* the court said (p. 230):

"That case dealt with Article I, § 4, of the
221 Constitution, which provides that the times, places and manners of holding elections for Senators and Representatives in each State shall be determined by the respective legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place for choosing Senators. As shown in the opinion in that case, Congress has itself recognized the referendum as part of the legislative authority of the State for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the State constitution when
222 applied to a law redistricting the State with a view to representation in Congress was not unconstitutional. Article I, § 4, plainly gives authority to the State to legislate within the limitations therein named. *Such legislative action is entirely different from the requirement of the constitution as to the expression of assent or dissent to a proposed amendment to the Constitution.* In such expression no legislative action is authorized or required" (Italics mine).

So as to presidential electors, as is made clear in *McPherson* v. *Blacker*, 146 U. S. 1, the Legislature possesses plenary authority to direct the manner of their appointment, and might itself exercise the appointing power, by joint ballot or concurrence of the two houses, or by law, or by vote of the people, and if by vote of the people, by general ticket or by districts (p. 25).

This is so because it is provided in clause 2 of Section 1 of Article II of the Federal Constitution that "Each State shall appoint, in such manner as the Legislature thereof may direct, a Number of 224
Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress", and it is therefore the *State* which acts in this matter. "The Constitution recognizes that the people act through their representatives in the Legislature, and leaves it to the Legislature exclusively to define the method of effecting the object" (P. 27).

But there is no such plenary power in the Legislature as to Congress districts. Members of Congress are to be "chosen by the people of the several States" (Art. I, § 2), at times and places and in manner, not to be determined *by the State,* in which 225
case the Legislature, on the analogy of the electors, might speak for all, *but as prescribed by the Legislature, subject to laws of Congress affecting the same, which laws lay down that the prescription shall be in statute form.*

2. *Concurrent Resolution has not the effect of law.*

In most of the States, including New York, a concurrent resolution, which ordinarily is not sub-

226 *Exhibit 1.*

mitted to the Executive for his approval, is not regarded as a law. "A concurrent resolution of the two houses is not a statute" (*People ex rel. Argus Co.* v. *Palmer,* 12 Misc. 392, affd. 146 N. Y. 406.)

The rule is different in the Federal Congress, where a resolution has the same status as a bill (U. S. Constitution, Art. I, § 7, subd. 3), and must, like a bill, be approved by the President or repassed over his veto to become effective. So Cushing (Law of Legislative Assemblies, § 2403) says:

227 "A form of legislation, which is in frequent use in this country chiefly for administrative purposes of a local or temporary character, sometimes for private purposes only, is variously known, in our legislative assemblies, as a joint resolution, a resolution, or a resolve. This form of legislation is recognized in most of our Constitutions, in which, and in the rules and orders of our legislative bodies, it is put upon the same footing, and made subject to the same regulations, with bills properly so called. In Congress, a joint resolution, which is the name given in that body to this kind of legislation, is there regarded as a bill."

228 Even so, and although it appears from *Olds* v. *Comr. of Land Office* (86 N. W. 936, affd. on rehearing 96 N. W. 508) that the Michigan Constitution recognized legislation by joint resolution, where the measure was limited to a single occasion and was not designed to become permanent law, and from *Linsly* v. *Hubbard,* 44 Conn. 109, that the Legislature of Connecticut could authorize, by mere resolution, the sale of lands in which certain parties held a contingent interest, and there may be

other States with similar provisions (see citations of counsel in *People ex rel. Burritt* v. *Comrs. State Contracts, Ill.*, 11 N. E. at p. 181) the great weight of authority in States with constitutional provisions similar to our own is that a joint or concurrent resolution, adopted by the Legislature, will not have the force or effect of a law where the Constitution, under which the legislative body operates, requires the enactment of all laws to be in some prescribed form other than by resolution.

It is true that Senate Rule 18 provides that "all resolution which propose any amendment of the 230
Constitution, or ratify any proposed amendment to the Constitution of the United States, shall be treated, in the form of proceedings on them, in a similar manner with bills," and that Assembly Rule 6 provides that "concurrent resolutions proposing amendments to the Constitution of the State and concurrent resolutions proposing or ratifying amendments to the Constitution of the United States shall, for all legislative purposes, be deemed to be and be treated as bills," and that there are various other provisions in the Rules for the handling of these and other concurrent resolutions in general legislative practice, and that Speaker Mac- 231
hold held that a concurrent resolution may provide that it shall be submitted to the Governor for his consideration and must be approved by him to become effective (Assembly Journal, 1923, p. 317); but this is a long way from making them statutes.

Section 16 of Article I of the Constitution provides that "the resolutions of the Congress of the said colony, and of the convention of the State of New York," in force on April 20, 1777, which have not since expired, or been repealed or altered,

"shall be and continue the law of this State." But from that point it parts company with resolutions as a means of making law. "No law shall be enacted except by bill." (Art. III, § 14.) All bills, and therefore all laws, must have an enacting clause, "The People of the State of New York, represented in Senate and Assembly, do enact as follows." (*Id.*) "Every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor" for his approval or disapproval, etc. (Art. IV, § 9.) Nothing of the kind
233 is essential in relation to a joint resolution. It has no enacting clause, and need not go to the Governor for any purpose. Such a resolution, if passed by the requisite vote and signed by the presiding officers, is in full force (Legislative Law, §§ 40-42), although it has been held, as stated above, that the Legislature may, if it wishes, make the effectiveness of a concurrent resolution dependent upon the Governor's approval.

As has been noted this distinction is drawn in most of the States, following Judge Cooley's expression of the principle (Const. Lim., 10th ed., p. 266):

234 "When the legislative power of a State is to be exercised by a department composed of two branches, or, as in most of the American States, of three branches, and these branches have their several duties marked out and prescribed by the law to which they owe their origin, and which provides for the exercise of their powers in certain modes and under certain forms, there are other questions to arise than those of the mere intent of the law-

makers, and sometimes forms become of the last importance; for in such case not only is it important that the will of the law-makers be clearly expressed, but is also essential that it be expressed in due form of law; since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential." 235 236

Thus, in Illinois, it was held (*People ex rel. Burritt* v. *Comrs. State Contracts,* 11 N. E. 180) that an appropriation for printing and binding could not be made by a joint resolution which had no title and no enacting clause and lacked the signature and approval of the Executive. The measure was invalid on other grounds as well, but it was expressly decided that, though otherwise sound, that which the Constitution says can be done only by law cannot be accomplished by a document lacking the necessary form and essential prerequisites of a law. The Court did not withhold from a concurrent resolution a certain efficacy, but it said: 237

"While, in respect of many matters, the Legislature may speak by resolution, under our Constitution it is denied the power to enact laws except in the mode so carefully pointed out."

In *Mullan* v. *California,* 114 Cal. 578. L. R. A. 262, it was held that the Legislature could not by concurrent resolution confirm an appointment and

238 *Exhibit 1.*

authorize compensation, where the Constitution provided that the Legislature should have no power to authorize the payment of a claim against the State "under any agreement or contract made without express authority of law," and that "no law shall be passed except by bill."

Under the provisions of the Indiana Constitution that "No money shall be drawn from the Treasury but in pursuance of appropriations made by law," that all laws shall be enacted by bill, and that all bills must have an enacting clause and be approved
239 by the Governor to be effective, it was held (*May* v. *Rice,* 91 Ind. 546) that money could not be appropriated by joint resolution. The Court granted, however, that various functions might be fulfilled by such resolution "if such expression of the legislative will falls short of the enactment of a law."

To the same effect, see *Reynolds* v. *Blue,* 47 Ala. 711; *Collier, etc. Lith. Co.* v. *Henderson,* 18 Colo. 259, 32 Pac. 417; *State* v. *Platt,* 2 S. C. 150; *San Antonio* v. *Micklejohn,* 89 Tex. 79, 33 S. W. 735; *Cape Girardeau* v. *Fougeu,* 30 Mo. App. 551; *Barry* v. *Viall,* 12 R. I. 18; *Bovers* v. *Crane,* 1 W. Va. 176. In *State* v. *Kinney,* 56 Oh. St. 721, 47 N. E. 569, a
240 joint resolution submitting to the people the question of calling a constitutional convention was held void, not *per se,* but because of certain provisions therein which attempted to repeal or amend existing statute law. Perhaps the strongest language employed upon the subject is that of the Montana Supreme Court in *State ex rel. Peyton* v. *Cunningham,* 39 Mont. 197, 18 Ann. Cas. 705, in which the Court holding that a joint resolution of the Legislature in ordinary form, having no title or enacting clause and not being introduced by bill, though

approved by the Governor, is precluded from having the force and effect of a law by the provisions of the Montana Constitution that "no law shall be passed except by bill," that "the enacting clause of every law shall' be in a prescribed form, and that the subject of every law "shall be clearly expressed in its title," said:

> "If the Legislature may disregard these provisions, there is no other which it might not with equal propriety disregard, with the result that that branch of the government would act without limitation or restriction other than the 242
> whim or caprice of the majority. So the courts of all the States having constitutional provisions similar to them have refused to recognize mere resolutions adopted by the Legislature, whether joint or concurrent, or whether approved by the Executive or not, as having the force of law."

3. *The overwhelming precedent in this State indicates that Reapportionment should be by law.*

In the foregoing, I think there has been stated the general principle that a concurrent resolution 243
is not a law, and that there cannot be accomplished by a concurrent resolution what the Constitution requires shall be done by law, however fully and emphatically the proponents of that proposition may desire. Constitutional conventions made apportionments in 1821, 1846, and 1894, and there were legislative apportionments, *all by statute*, by L. 1802, ch. 79; L. 1808, ch. 90; L. 1815, ch. 142, ch. 208 (vetoed); L. 1822, ch. 209; L. 1826, ch. 289; L.

244 *Exhibit P.*

1836, ch. 436; L. 1846, ch. 94; L. 1857, ch. 339; L. 1866, ch. 805; L. 1879, ch. 208; L. 1892, ch. 397; L. 1906, ch. 431; L. 1907, ch. 727; L. 1916, ch. 373; L. 1917, ch. 798. *A reapportionment bill* was passed twice in both houses in 1926, but was vetoed.

In all this legislation nothing appears to indicate reluctance on the part of the Legislature to carry out its constitutional functions by means of statutory enactments. Lincoln's Constitutional History sheds no light upon the particular question. Examination of the Messages of the Governors, while it develops several vetoes, the action of Gov-
245 ernor Robinson in allowing the apportionment of 1879 to become a law without his approval (Messages, vol. VII, p. 401) and extremely bitter criticism of the Legislature by Governor Robinson and Governor Hill, fails, not unnaturally, to disclose any thought upon the part of the Executive that they might not be entitled to share in the task of apportionment. Governor Flower, indeed, in a message to the extraordinary session of 1892 (April 15; Messages, vol. IX, p. 155), refers to reapportionment as "now the duty of the law-making power," of which "law-making power" the Governor is, of course, a part, although he is no part of the
246 Legislature. Only Governor Hughes appears to have made a direct assertion on the subject, when he wrote to the extraordinary session of 1907 (Public Papers, July 8, 1907, p. 52):

> "It is not my purpose to propose a particular plan of apportionment. It is the function of the Legislature to formulate such plan and submit it by suitable bill for Executive action."

Apportionment Acts have been the subject of considerable litigation, particularly following the ap-

portionments of 1892, 1906 and 1916. In *People ex rel. Carter* v. *Rice,* 135 N. Y. 473, the validity of the 1892 Act was challenged on numerous constitutional grounds, among which was not raised the issue of an improper participation by the Governor. The Court held, five to two, that the constitutional provision vesting in the Legislature, the power to alter the Senate districts after each enumeration, grants a discretion which the Court has no jurisdiction to review, unless it appears that it has been plainly and grossly abused. Referring to this case in *Baird* v. *Kings County,* 138 N. Y. 95, 248
Judge Peckman, who wrote both opinions, said it was not intended in the *Rice* case to intimate "that in no case could the action of the Legislature be reviewed by the courts, but that cases might easily be imagined where the action of the Legislature" would exhibit a gross and intentional violation of the Constitution, and then the Court might interfere and restrain or prevent the abuse of legislative discretion.

As a matter of fact, this doctrine of the *Rice* case was overruled in *Sherrill* v. *O'Brien,* 188 N. Y. 185, reversing 144 App. Div. 890, where it was held that the right of review is expressly conferred by Article III, Section 5 of the Constitution, that the author- 249
ity of the Legislature in matters of apportionment is a delegated authority wholly derived from and dependent upon the Constitution, and that examination of the successive Constitutions shows an intentional and gradual withdrawal from the Legislature of discretionary power and a continued adding of limitations upon its powers in the matter of apportionment. This case held the Act of 1906 unconstitutional.

250 *Exhibit 1.*

The Governor's powers in connection with apportionment were alluded to in *Matter of Reynolds*, 202 N. Y. 430, 444, in which an attack upon the apportionment of 1907 was defeated, the Court saying:

> "We think the suggestion that the Legislature at an extraordinary session would be under the domination of the Governor and thus be induced to pass an unfair statute, and that the constitutional provisions were intended to guard against such an evil is wholly fanciful.
251 Such a thought might occur to a recluse whose knowledge of the world is exclusively gathered from the books in his library, but would not be considered seriously by any one whose familiarity with government was acquired by participation in public affairs. The Governor would have no personal interest in an apportionment, and if he and the Legislature were in accord, he would have no reason for resorting to an extraordinary session. On the other hand, no one can imagine that any Governor could force a hostile Legislature to enact an apportionment bill unfair to the party of the legislative
252 majority either at a regular session or at an extraordinary session, unless possibly by the exercise of the veto power, which is equally great at either session."

The Apportionment Act of 1916 was likewise attacked in *Matter of Dowling*, 219 N. Y. 44, and the various principles involved, not including, however, the one with which the present inquiry is concerned, were carefully considered, the result being that part of the Act was held to be invalid and the whole was set aside.

253

Study of these and other cases indicates that the Court of Appeals, in common with the various Governors, has always taken it for granted that an apportionment is to be made by legislative act, that is to say, a statute. As to this, it may be said that the Court would not be likely to rule upon such a question unless the point were raised by litigants before it. But that every Legislature which has had the task of apportionment to perform has acted as if it held the same belief, *viz.*, that it must be accomplished by law, sets up a weight of authority that may well be dismaying.

254

Very truly yours,

JOHN J. BENNETT, JR.,
Attorney General.

255

256 **Exhibit 2.**

APPENDIX F.

An Act to Consolidated, Codify, and Set Forth General and Permanent Laws of the United States in Force December Seventh, One Thousand Nine Hundred and Twenty-five.

[C. 713, 44 Stat. 773.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fifty titles hereinafter set forth are intended to embrace the laws of the United States, general and permanent in their na-
257 ture, in force on the 7th day of December, 1925, compiled into a single volume under the authority of Congress, and designated "The Code of the Laws of the United States of America."

SEC. 2. In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States—

(a) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this Act
258 shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.

(b) Copies of this Act printed at the Government Printing Office and bearing its imprint shall be conclusive evidence of the original of the Code in the custody of the Secretary of State.

(c) The Code may be cited as "U. S. C." (Vol. 1, p. 3, U. S. C.)

Exhibit 8.

1. Inhabitants of the State of New York to be divided into 45 Congressional Districts as provided in the Fifteenth Census of the United States, Act of Congress June 18th, 1929 12,588,066

Divided equally into 45 Congressional Districts, each District would average 279,734 inhabitants plus.

2. The number of inhabitants of the 45 Congressional Districts the boundaries of which are divided in the so-called Concurrent Resolution of April 10th, 1931, are as follows:

District	*Number of Inhabitants.*
1	319,401
2	303,053
3	268,403
4	226,997
5	276,116
6	307,613
7	305,689
8	288,266
9	202,633
10	383,612
11	241,969
12	263,1[illegible]
13	290,225
14	484,893
15	385,503
16	387,067
17	249,292
18	284,865
19	275,301
20	285,284
21	305,615

262 *Exhibit 3.*

22	332,454
23	308,111
24	319,078
25	259,940
26	261,007
27	309,588
28	202,519
29	211,933
30	261,771
31	235,586
32	217,300
33	216,456
34	262,769
35	269,560
36	291,606
37	242,562
38	237,230
39	217,163
40	206,718
41	288,916
42	230,607
43	267,957
44	270,949
45	236,880

263

264 3. The Fifteenth Census of the United States gives to the City of New York 6,930,447 inhabitants.

4. Twenty-two and one-half Representatives are apportioned to the City of New York by the said Concurrent Resolution.

5. Twenty-two and one-half Representatives are likewise apportioned by the said Concurrent Resolution to the territory outside of the City of New

Exhibit 3. 265

York, representing 5,657,620 inhabitants as given by the Fifteenth Census of the United States.

6. The County of New York, Borough of Manhattan, City of New York, by the Fifteenth Census is given 1,867,312 inhabitants. Divided into six districts this would give to each District as an equal unit 311,218 inhabitants plus. The so-called Concurrent Resolution divides the said New York County, Borough of Manhattan, into six Districts as follows:

District.	*Number of Inhabitants.*	266
15	385,503	
16	387,067	
17	249,292	
18	284,865	
19	275,301	
20	285,284	

A fair and equal division of New York County in accordance with the State ratio of 279,734 inhabitants per unit of the 45 Congressional Districts would give six Districts to New York County with a surplus of 188,908 inhabitants available for combination with the part of Bronx County next adjoining New York County. 267

7. The Fifteenth Census of the United States gave to the County of Bronx 1,265,258 inhabitants. A fair apportionment would give to each District of the four assigned by the Concurrent Resolution to Bronx County 279,734 inhabitants, leaving a surplus of 146,320 in Bronx County, which, added to the surplus of 188,908 in New York County, would furnish a compact, contiguous District between the two counties as heretofore in existence

268 *Exhibit 3.*

and would furnish a fair and just division of the inhabitants of the counties. The so-called Concurrent Resolution divides Bronx County into four Districts as follows:

District.	*Number of Inhabitants.*
21	305,615
22	332,454
23	308,111
24	319,078

8. The Fifteenth Census of the United States
269 assigns to Kings County 2,560,401 inhabitants. A fair, equal and just division would apportion nine full Districts to Kings County of 284,489 inhabitants each. Kings County is subject to subdivision by avenues, streets and blocks with little difficulty into compact, contiguous, nearly equal Districts. A fair and equal division of Kings County into eight Districts as apportioned by the Concurrent Resolution would give to each District 320,050 inhabitants plus. The said Concurrent Resolution divides Kings County into eight Districts as follows:

270 *District.*	*Number of Inhabitants.*
7	305,689
8	288,266
9	202,633
10	383,612
11	341,969
12	263,114
13	290,225
14	484,893

9. The so-called Concurrent Resolution creates as the First District Richmond and Suffolk Counties, which are neither contiguous nor compact.

Exhibit 3.

10. The descriptions and boundaries described in the said Concurrent Resolution of certain Districts are in many instances indefinite, uncertain, non-existent and impracticable for election purposes.

Maps which will be submitted to the Court and which are made by reference a part hereof will exemplify the foregoing inequalities and lack of compactness and contiguity and uncertainty of boundaries in the Districts apportioned by the said Concurrent Resolution.

274 **Opinion of Court.**

SUPREME COURT,

ALBANY COUNTY.

IN THE MATTER

of

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order

275 against

EDWARD J. FLYNN, Secretary of State of the State of New York.

(Supreme Court, Albany County Special Term, October, 1931.)

(Justice Ellis J. Staley, presiding,)

APPEARANCES:

ABRAHAM S. GILBERT, Esq., and BENJAMIN L. FAIRCHILD, Esq., Attorneys for Petition-
276 ers.

JOHN J. BENNETT, JR., Esq., Attorney General, Attorney for Respondent (Henry Epstein, Esq., of Counsel).

JOHN GODFREY SAXE, Esq., Attorney for James A. Farley, Chairman of the Democratic State Committee, Respondent-Intervener (Robert F. Wagner and John J. O'Connor, Esqs., of Counsel).

MEMORANDUM.

STALEY, *J.*:

This application is made for a mandamus order directing the Secretary of State to certify in election notices that forty-five (45) representatives in the House of Representatives in the Seventy-third Congress are to be elected in the congressional districts as defined in a concurrent resolution of the Senate and Assembly of the State of New York. Section 4 of Article 1 of the Federal Constitution provides: 278

> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations except as to the place of choosing senators."

An act of congress approved June 18, 1929, provided for the fifteenth and subsequent decennial censuses and for an apportionment thereunder of representatives in congress among the several states. The effect of this census statute and the apportionment made thereunder was an increase in the number of representatives of the State of New York in the House of Representatives from forty-three (43) to forty-five (45). 279

On April 10, 1931, the Assembly and Senate composing the Legislature of the State of New York, passed a concurrent resolution subdividing the State into forty-five (45) congressional districts, and therein specified and fixed the boundaries of such districts.

280 *Opinion of Court.*

This resolution was not in the form of a bill or law. It was not submitted to the Governor of the State for his approval. Subsequent to its passage it was submitted for filing to the Secretary of State.

The Attorney General has rendered an opinion to the Secretary of State, advising him that such resolution is ineffective to accomplish a redistricting of the State into congressional districts, and for the purpose of this proceeding, it is conceded that the Secretary of State will refuse to follow this resolution in his certificate for the Election of 1932.

281 The substantial question involved is whether the Legislature of the State of New York has the power to divide the state into congressional districts by a concurrent resolution not submitted to the Governor of the State for his approval, or whether the Legislature was compelled to make such subdivision by an enactment of law subject to the approval of the Governor.

This question compels a consideration of the meaning of the term "Legislature" as used in Section 4 of Article I of the Federal Constitution, of the existence of any enactment by congress under its reserved power altering the constitutional regulation, and the extent of executive participation in
282 the law making power of the State of New York to validate legislative action therein.

> "The legislative power of this state shall be vested in the Senate and Assembly." (N. Y. Constitution, Article 3, Section 1.)

Every bill which shall have passed the Senate and Assembly shall before it becomes a law be approved and signed by the Governor, or upon executive disapproval, approved upon reconsideration by

two-thirds of the members elected to each house of the Legislature. Any bill not returned by the Governor within ten (10) days, unless return is prevented by adjournment, shall be a law in like manner as if he had signed it. (N. Y. Constitution, Article 4, Section 9.)

This latter section establishes the necessity of executive action of an affirmative or negative character to give the force and effect of law to enactments of the Legislature. It makes the Governor of the State an essential part of the law making process and power, and establishes the extent of executive participation. 284

After the census of 1910, the Thirteenth Census, the congress in accordance with its custom following every census, passed an act which apportioned the members of the House of Representatives among the several states. This act was approved August 11, 1911, and is referred to as the 1911 Apportionment Act. In addition to the numerical apportionment among the states of the members of the House of Representatives, it contained provision for representatives in certain territories upon their admission as states before apportionment under the next decennial census; it provided that the districts in each state entitled to more than one representative shall be composed of a continguous and compact territory and contain as nearly as practicable an equal number of inhabitants; that in case of increase in the number of representatives in any state, that such additional representatives shall be elected by the state at large, and the others from the existing districts, "until such state shall be redistricted in the manner provided by the laws thereunder", and if no change in number from 285

the existing districts, "until such state shall be redistricted as herein prescribed."

The case of Davis vs. Hilderbrant, 241 U. S. 565, involved these provisions of the 1911 Apportionment Act in relation to provisions of the Constitution of the State of Ohio granting the right of referendum as a part of the legislative authority of that state. This case held that a redistricting act of Ohio for the purpose of congressional elections was properly submitted for validity to the referendum test, when such was duly invoked, because
287 the enactment of congress requiring that the redistricting should be made by a state, "in the manner provided by the laws thereof" compels such procedure.

Whatever the inference of this decision may be, it sustained the power of congress to so deal with congressional elections. It did not define or establish the method of the exercise of the legislative power of that state to regulate congressional elections under the Federal Constitution in the absence of such congressional enactment, but accepted the act as sufficient justification for referendum submission.

288 Respondents herein contend that the Davis case is controlling here, for the reason that the provisions of the 1911 Apportionment Act are still in effect; that they have not been repealed expressly or by implication and that their requirement "in the manner provided by law" is fatal to the method of action by the New York State Legislature reviewed in this proceeding.

With that contention I am constrained to disagree. The act of 1911 was limited by its title to one for the apportionment of representatives "un-

der the Thirteenth Census." Its provisions are limited by express language to procedure required, "under this apportionment." It was a temporary enactment designed for a specific purpose which has been performed. Its life has expired. It has been superseded by the apportionment under the 1929 Act. Its provisions limited by its language to the apportionment under the Thirteenth Census has no force or application to an apportionment under the Fifteenth Census.

The debates in congress when the 1929 census and apportionment act was considered, in relation 290
to a proposed amendment thereto, which are urged by the Attorney General as a valued guide to justify judicial determination that the general provisions of the 1911 Act are still law, can not be accorded such force and effect. At best they are mere expressions of opinion of individual members, that the general provisions of the 1911 Act would still prevail after the enactment of the 1929 Act; a view which was rejected. Such expressions are not to be accepted by the courts as controlling or competent aids to establish as law a statute which has ceased to exist under its own limitations.

The inclusion of the general provisions of the 291
1911 Act in the Code of Laws of the United States adopted in 1926 (Code of the Laws of the U. S. Title 2) does not effect a re-enactment of those provisions.

Section 2 (a) of the act of congress under which the codification was made (Chapter 712, 44 Stat. 777) provides: "but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising

through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactments."

Hence there exists no congressional regulation which alters the power of the Legislature of each state to prescribe in a proper and legal manner the times, places and manner for holding elections for representatives in congress.

The word "legislature" as used in Section 4 Article 1, and other sections of the Federal Constitution, has been the subject of judicial construction by State and Federal courts.

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In Minnesota vs. Holm,— Minnesota, , a recent case, it was construed as meaning the representative body which makes the laws of the state, not synonymous with the law making power of the state and not including constitutional participation by the Governor of that state. Upon this holding an act of the Legislature of Minnesota, vetoed by the Governor providing for congressional redistricting was declared valid.

In State vs. Polley, 26 S. D. 5, it was given a contrary construction and there held to include the whole constitutional law making power of the state and subject to the referendum vote of the people and not limited simply to the members who compose the Legislature. It was further held in this case that a state in its sovereign capacity possessed the power to regulate elections therein; that Section 4 of Article 1 of the Federal Constitution was not a grant but a recognition of that power, subject, however, to the reservation of a power of Congress to establish regulations in relation to

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congressional elections and to that extent circumscribing the legislative authority.

In Hawke vs. Smith, 253 U. S. 221, the term "legislature" as used in Article 5 of the Federal Constitution in respect to the ratification of amendments to the Constitution was held to mean, the deliberative representative bodies that make the laws of the people for the respective states, and that the ratification of a proposed amendment to the Federal Constitution by the legislature of a state is not an act of legislation but is the expression of the assent of the state to the proposed amendment. 296

The opinion of Mr. Justice Day referring to the meaning of "legislature" as used by the framers of the Constitution in requiring "ratification" of amendments, says:

> "That was not a term of uncertain meaning when incorporated in the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which make the laws of the people. The term is often used in the Constitution with this evident meaning."

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These expressions have been seized upon as justification for the exercise by legislatures of an independent power, unlimited by state constitutional requirements, to establish congressional districts, in the state. The decision in this case and the expression of the opinion may be regarded as the prompting genesis of the concurrent resolution herein involved. At least they are asserted as authority for its validity.

298 *Opinion of Court.*

It is significant that the opinion in this case in its reference to the portions of the Federal Constitution, where the term "legislature" is used with this evident meaning does not include Section 4 of Article 1 of the Constitution. That a view was entertained that a different meaning should be ascribed to the term as used in Section 4 Article 1 is plainly indicated by reference in this opinion to the case of Davis vs. Hilderbrant, in relation to which it said:

> "Article 1, Section 4 plainly gives authority
> 299 to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the constitution as to the expression of assent or dissent to a proposed amendment to the constitution. In such expression no legislative action is authorized or required."

The recognition of the difference in the method of functioning by the legislature where it exercises or did exercise the power of choosing a United States Senator, of ratifying or rejecting a proposed amendment to the Federal Constitution, of being
300 bound by oath to support the Constitution of the United States and that of "prescribing" the districts in a state from which representatives in congress shall be elected, is I believe, the key to correct interpretation. The nature of the function delegated to the legislature for performance affects and determines the methods of its action.

Legislative action has been frequently designated in judicial opinions as "legislative authority", "legislative power" and "the law making power".

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A clear distinction exists between action, which in the very nature of things, must be taken by votes of the members of the legislatiure, and action taken by legislative authority. In the latter case, there must be an exercise of the law making power and in this state, the Governor, as well as the members of the legislature, is an essential part of that power.

When the legislature is granted the power to prescribe, it means that the legislature will do so by the exercise of its legislative power and the exercise of that power to be effective must be in accord with all the law making essentials.

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In the State of New York, the Governor is an essential factor in the process. Judge Cardozo in the recent case of Doyle vs. Hofstader, 257 N. Y. 244, said:

> "The legislature can initiate but without the action of the Governor it is powerless to complete. It is not the sole custodian of legislative power. The power is divided between the legislature and the Governor."

Until this year the settled practice of all the states, so far as research has been able to determine, has been uniform in the method of establishing congressional districts by law enacted in the manner required by the law making process of each state. Such action for nearly a century and a half furnishes a practical construction of the method of performing this function of persuasive, if not controlling and conclusive weight. Common usage and practice indicating a particular interpretation of a constitution or statute is a great value in determining its real meaning.

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"We do not readily overturn the settled practice of the years". (Story vs. Craig, 231 N. Y. 33.)

> "The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight. * * * The
> 305 construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive" (McPherson vs. Blacker, 146 U. S. at pages 27 and 36).

Two views completely divergent of the meaning of the term "legislature" as used in Section 4 Article 1 of the Federal Constitution are presented by the decisions of the Supreme Court of South Dakota and Minnesota. Such a difference of view by
306 high judicial authority opens the door for resort to the uniform practice which has prevailed since the Constitution was established as a guide and authority for decision.

The force of custom, practical construction and usage should not at this late day yield to judicial interpretation of a term, declared in relation to the performance of a public function, which must, in the very nature of things, be performed by the individual choice and views of the members of the public body to which it is committed, when at-

tempted to be applied to such body in the performance of a task which involves and reflects deliberate action by a state.

The construction of the requirement of the Constitutional provision in the method of congressional apportionment, as evidenced by the many laws of the states, so long practiced and acquiesced in, should not be upset and governmental processes thrown into confusion because the executive will not approve a congressional apportionment as enacted by the legislature or the legislature will not enact one which will receive executive approval.

Order may be entered denying the application for mandamus order, without costs. 308

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Stipulation as to Exhibits.

IT IS HEREBY STIPULATED that the several maps submitted to the Court at Special Term upon the argument of the motion for the mandamus order, may be omitted from the printed record on appeal herein.

IT IS FURTHER STIPULATED, however, that upon the argument of any appeal in any court, either party may produce said maps or any of them with the same force and effect as though photostatic copies thereof were contained in the record on appeal herein.

Dated, November 13, 1931.

ABRAHAM S. GILBERT and
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners-Appellants.

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Respondent, Edward J. Flynn, Secretary of State of the State of New York.

JOHN GODFREY SAXE,
Attorney for James A. Farley, Chairman of the Democratic State Committee, Intervenor-Respondent.

Stipulation Waiving Certification.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the papers herein printed consist of true and correct copies of the notice of appeal, the order appealed from and of all the papers used upon the hearing of the motion upon which the order appealed from was made and of the whole thereof, now on file in the office of the Clerk of the County of Albany. Certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, November 13, 1931.

ABRAHAM S. GILBERT and
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners-Appellants.

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Respondent, Edward J. Flynn, Secretary of State of the State of New York.

JOHN GODFREY SAXE,
Attorney for James A. Farley, Chairman of the Democratic State Committee, Intervenor-Respondent.

Notice of Appeal to Court of Appeals.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER

of

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order,

Petitioners-Appellants,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervenor-Respondent.

SIRS:

PLEASE TAKE NOTICE that the petitioners, Samuel S. Koenig, John J. Knewitz and William L. Ward, hereby appeal to the Court of Appeals from the order of the Appellate Division, Third Department, entered on the 31st day of December, 1931, finally determining this proceeding, affirming the order heretofore entered at Special Term, which denied the petitioners' application for a mandamus order against Edward J. Flynn, Secretary of State of the State of New York, as resettled by the order of the Appellate Division, Third Department, entered on

the 11th day of January, 1932, and from each and every part of said order, as well as from said resettled order, and from each and every part thereof.

Dated, New York, January 11, 1932.

Yours, &c.,

ABRAHAM S. GILBERT and
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners-Appellants,
Office & P. O. Address,
10 East 40th Street,
Borough of Manhattan,
City of New York.

To:

Hon. JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Respondent,
Albany, N. Y.

JOHN GODFREY SAXE, Esq.,
Attorney for Intervenor-Respondent,
1 Cedar Street,
New York City.

CLERK OF THE COUNTY OF ALBANY,
Albany, N. Y.

322 **Order of Affirmance Appealed From.**

At a term of the Appellate Division of the Third Department, held at the County Court House in the City and County of Albany, commencing on the 17th day of November, 1931.

Present—Hon. CHARLES C. VAN KIRK,
Presiding Justice,
" HAROLD J. HINMAN,
" EDWARD C. WHITMYER,
" JAMES P. HILL,
" LEON C. RHODES,
Associate Justices.

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IN THE MATTER
of
The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD, for a Mandamus Order,
Petitioners-Appellants,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,
Respondent,

324 and

JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

Upon the order entered herein on the 31st day of December, 1931 and upon the consent of the parties herein, it is

ORDERED that the order heretofore made and entered herein on the 31st day of December, 1931, be resettled to read as follows:

Order of Affirmance Appealed From. 325

At a Term of the Appellate Division of the Third Department, held at the County Court House in the City and County of Albany, commencing on the 17th day of November, 1931.

Present—Hon. CHARLES C. VAN KIRK,
Presiding Justice.
" HAROLD J. HINMAN,
" EDWARD C. WHITMYER,
" JAMES P. HILL,
" LEON C. RHODES, 326
Associate Justices.

IN THE MATTER
OF
The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order,
Petitioners-Appellants,
against
EDWARD J. FLYNN, Secretary of State of the State of New York, 327
Respondent,
and
JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

An appeal having been taken to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, by the petition-

328 *Order of Affirmance Appealed From.*

ers Samuel S. Koenig, John J. Knewitz and William L. Ward from an order made and entered herein by Hon. Ellis J. Staley, Justice of the Supreme Court, sitting at Special Term and filed in the office of the Clerk of the County of Albany on the 12th day of November, 1931, denying petitioners' application for a peremptory order of mandamus against the respondent, Edward J. Flynn, Secretary of State of the State of New York, and from each and every part of said order, and the said appeal having come regularly on to be heard at a term of this court on the 24th of November, 1931, and the Petitioners-
329 Appellants having appeared by Abraham S. Gilbert and Benjamin L. Fairchild, Esqs., and the Respondent, Secretary of State, having appeared by John J. Bennett, Jr., Attorney General (Henry Epstein, First Assistant Attorney General, of counsel), and the Respondent Intervenor, James A. Farley, having appeared by John Godfrey Saxe of counsel, and the said argument having been heard and due deliberation having been had thereon,

Now, on all the proceedings had herein, it is

"ORDERED, that the said order appealed from de-
330 nying the peremptory order of mandamus as a matter of law and not in the exercise of discretion, be and it hereby is unanimously affirmed as a matter of law and not in the exercise of discretion.

JOHN S. HERRICK,
Clerk.

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER
of
The Application of SAMUEL S. KOENIG, *et al.*, for a Mandamus Order,
Petitioners-Appellants,
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against
EDWARD J. FLYNN, Secretary of State of the State of New York,
Respondent,
and
JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

Argued, November Term, 1931;
Decided, November Term, 1931.

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Hon. CHARLES C. VAN KIRK,
Presiding Justice,
Hon. HAROLD J. HINMAN,
Hon. EDWARD C. WHITMYER,
Hon. JAMES P. HILL,
Hon. LEON C. RHODES,
Associate Justices.

334 *Opinion of Van Kirk, P. J.*

An Appeal from an Order made and filed in the Albany County Clerk's Office November 12th, denying petitioner's application for a mandamus order against the Secretary of State of this State:

ABRAHAM S. GILBERT, BENJAMIN L. FAIRCHILD, Room 2810, 10 East 40th St., New York, for Appellants.

Hon. JOHN J. BENNETT, JR., Attorney General, (HENRY EPSTEIN, of Counsel) for Respondent, Secretary of State.

335 JOHN GODFREY SAXE, 1 Cedar St., New York, (ROBERT F. WAGNER, JOHN J. O'CONNOR, of Counsel), for Intervenor, James A. Farley.

VAN KIRK, P. J.

The application to the special term was for a mandamus order directing the secretary of state to perform the duties imposed upon him by statute in respect to the election of representatives in Congress in the year 1932 under a reapportionment of congressional districts as fixed by a "concurrent resolution" of the Senate and Assembly of this
336 state. The special term entered an order denying the application. The appeal is from that order.

The concurrent resolution was not presented to the Governor. The mandamus order was sought on the ground that this resolution, without the Governor's approval, was a valid compliance with Article I, Section 4, of the Federal Constitution, which provides: "Control of congressional elections.—1. The Times, Places and Manner of holding Elections for Senator and Representatives, shall be prescribed in each State by the Legislature

thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators". The respondent contends that compliance can only be had by act of the law making power of the state. Thus the determining question in the case is the meaning of the word "legislature". We shall discuss this question by considering the case, first, in respect to the laws of the state; and, second, in respect to the federal constitution.

Our state constitution contains no provision in respect to redistricting for the election of representatives in Congress. It does make definite provisions for redistricting for election of members of the state legislature. (Article III, Sections 4, 5.) The Legislature has in a long series of *statutes* provided for redistricting the state for election of Representatives. As occasion arose a separate act or bill has been passed and approved by the Governor.

The state constitution, Article III, Section 1, provides: "The legislative power of this state shall be vested in the Senate and Assembly." The Governor of the State is no part of the Senate and Assembly. He takes no part in the original framing of a bill or resolution. He has no seat in either house and no right to debate therein. But he has a veto power (Constitution, Article IV, Section 9) as follows: "Every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it." This

passed by a two-thirds vote of each house, "it shall become a law notwithstanding the objections of the Governor". Thus the Legislature may enact a valid law despite the exercise of the veto power, but it is not the complete law making power. While the legislative department of the state is distinct from the executive department, the veto power is an express power conferred upon the executive and is a check upon the legislative power. (People v. Morton, 156 N. Y. 136, 144.) Thus, while the Governor is strictly no part of the Senate or Assembly, he is a part of the law making power. The two
341 above quoted sections of the Constitution must be read together. Both are operative. The Governor has power to act in respect to legislation. In reviewing an act passed by both houses, when presented to him, he has before him the questions of the constitutionality, the expediency of, and the necessity for the act. If he disapproves, he must state his objections thereto. Call his authority what we may he considers the bill as presumably the members and the senators had considered it. It was early held that he has a part in the enactment of laws, is "a participator in the function of making laws". (People v. Bowen, 21 N. Y. 517, 521.) This
342 view has prevailed to the last opinion of the Court of Appeals, where it was held that the Legislature is not the sole custodian of legislative power. "The power is divided between the Legislature and the Governor." (Matter of Doyle, 257 N. Y. 244, 261.)

In the State Constitution the "Legislature" is authorized to do many things which cannot be accomplished save by the functioning of the full legislative or law making power. Among other things the Legislature is given power to alter senatorial and assembly districts. (State Constitution, Arti-

cle III, Section 4.) This has uniformly been accomplished by statute, by act of the full legislative power, never by concurrent resolution." (See Matter of Reynolds, 202 N. Y. 430.) In like manner, until this year, this state has been redistricted for congressional elections by statute, the bill therefor having been presented to the Governor after it was passed by both houses. There can be no doubt then that, in the ~~State~~ Constitution, in the courts and in legislative acts, this state has used the word "Legislature" as meaning legislative, or lawmaking, power. As to the State, this seems conclusive. 344
(Davis v. Ohio, 241 U. S. 565, 567.)

We turn then to the Federal Constitution, Article I, Section 4, (*supra*) and to the federal courts, where we find a like construction. It is true there are a number of provisions in the Federal Constitution which delegate to the State Legislature duties which do not involve law making. Article I, Section 3, prior to the seventeenth amendment, provided that senators should be chosen in each state by the Legislature thereof. Choosing Senators by the Legislature required no apportionment or districting; it required no action by the law making power. We shall refer to this later. Article V provides for amendments to the Federal Constitution, 345
which amendments shall be valid when ratified by the Legislatures of three-fourths of the several states, or by conventions of three-fourths thereof. In Hawke v. Smith (253 U. S. 221, 226) it is said: "Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages, representative of the people, which it was assumed would voice the will of the people". And it was held that the adoption of an amendment did not require an act of the law making power. The

delegation to legislatures of the power to prescribe regulations for the election of Representatives in Congress is not mentioned in the opinion; nor is it held that, if a duty imposed upon the "Legislature" involves law making, the word "Legislature" would not mean the law making power. Redistricting for the election of representatives requires the enactment of a statute, as does redistricting for the election of State Senators and Assemblymen. This law making power is the natural and usual power to prescribe "times, places and manner of holding elections"; it is an appropriate power for making
347 an authoritative rule of action to be observed by officers and citizens of a state. We think the delegation of authority to prescribe regulations for elections of representatives in Congress is to the Legislature of the law making power. That this was the intent of the framers of the Constitution is further indicated by the fact that the power "by law to make or alter such regulations" was reserved in Congress. If alterations are to be made by law, why should not the regulations altered be so made?

Until recently this has been the construction of this section of the Federal Constitution by the states generally; elections have been conducted in
348 compliance with statutes enacted under this con-
0 struction and the validity of those elections has not been questioned. In the states redistricting for state elections has uniformly been accomplished by statute. Such general construction should have great weight, unless in violation of the plain mandates of the Constitution. (Gardner v. Ginther, 232 A. D. 296, 301, and cases cited). We find no plain mandate of the Constitution which has been violated by the practice which has been followed by the Federal Government and by the states for many

years. The elaborate and able arguments, supported by plentiful authorities, in this case, indicate that the meaning of this section is not entirely plain to all. If petitioners' contention is correct, some seven score years of erroneous practice passed before this alleged plain meaning was discovered.

We find support for our position in Davis v. Ohio (241 U. S. 565). When that case arose the Constitution of Ohio had been amended to provide that, after the enactment of a law by the Senate and House of Representatives and its approval by the Governor, upon petition, the question of whether 350
the law should become operative was to be submitted to a vote of the people and, if approved, the law should be operative. A bill redistricting the State for Congressional elections had been passed and approved by the Governor. A referendum was had and the statute was disapproved. A mandamus order was asked directing the state election officers to disregard the vote of the people on the referendum. The lower court held that the referendum was a part of the legislative power of the State and that nothing in the act of Congress of 1911, or in the constitutional provision, operated to the contrary. Therefore the disapproved law had no 351
existence and was not entitled to be enforced by mandates. On appeal to the United States Supreme Court the decree of the lower court upholding the referendum vote as part of the legislative power was affirmed. This was necessarily a holding that, in that case, the word "Legislature" in Article I, Section 4, meant the law making body of the State. In the opinion reference is made to the Federal act of August 8th, 1911 (37 Statute, 13), which provided that redistricting should be made by a state "in the manner provided by the laws thereof". This

introduces nothing in conflict with our view. The power to redistrict was delegated by the Constitution, not by Congress. The act of 1911 was an act of Congress. An act of Congress could in no wise change the Constitution. That which the Constitution meant when it was adopted it still meant when Congress passed the act of 1911. Thus, when Congress passed this act, it but declared its understanding of this section of the Constitution to be that the power to redistrict was delegated to the Legislature as the law making power. Unless that is the
353 true construction, the act of 1911 would be unconstitutional. So, as we understand, the United States Supreme Court held in Hawke v. Smith (*supra*, page 230), where the opinion in the Davis case is construed as follows: "It dealt with Article I, Section 4, of the Constitution, which provides that the times, places and manners of holding elections for Senators and Representatives in each state shall be determined by the respective legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place of choosing Senators. As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the State for
354 the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state constitution when applied to a law redistricting the State with a view to representation in Congress was not unconstitutional. Article I, Section 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the constitution. In such ex-

pression no legislative action is authorized or required." It seems to us that these two cases hold very plainly that the word "Legislature" in Article I, Section 4, means, where legislative action "is authorized or required," the law making power.

We have not overlooked the argument that, since Article I, Section 4, of the Federal Constitution uses the same language in respect to elections for Senators and Representatives and since the election of Federal Senators is conceded, formerly, to have been by the votes of the members of the two houses only, the redistricting must be made by the two houses only; that is, the word "Legislature" 356
must have the same meaning in one case as in the other. We cannot consent. The distinction is stated in Hawke v. Smith, *supra*. Also there are the other sections in Article I of the Federal Constitution. Section 3, Sub. 1, before the seventeenth amendment was adopted, provided that Senators shall be chosen by the Legislature. In the choosing of Senators then, the members of the Legislature were required in some form to vote. The majority of the votes determined the successful candidate. A Governor was not a member of a state Senate or Assembly. He had not a right to vote. Neither could he defeat the choice of the majority by a vote. It 357
could not have been intended that a Governor, a member of one party, could defeat by veto the election of a candidate of another party, which had a majority, but not a two-thirds majority, in the two houses. Evidently no action by the law making body as such was intended. Section 2, Sub. 1, provides that representatives be chosen "by the people of the several states". Sub. 3 of this section provides for the enumeration of the voters in each state for the apportionment of members to each state.

Then (Section 4) follows the delegation of power to prescribe the "times, places and manner" of holding elections. This is a power quite different from the power to choose a Senator. This delegated power to prescribe regulations is also a mandate. It involves a redistricting of the state. This is to be made by a state in the manner prescribed by the laws thereof, not by votes of the individual members. It is an act of the law making power.

The ultimate regulation of the "times, places and manner" of holding elections for Representatives is in the Federal Congress. The Federal Constitution
359 has delegated this power to regulate to the State Legislatures, but has reserved in Congress the power to "make or alter such regulations". State laws prevail unless altered by Congress. (In re Coy, 127 U. S. 731, 752.) In no respect, material in our view of this case, has Congress altered any law of, or practice in, this State in respect to the election of Representatives in Congress.

We conclude that Article I, Section 4, of the Federal Constitution delegates to the State Legislature authority to take such action as is customary and necessary under the law of the State to make effective its mandate; that, where the action involves
360 the law making power, that power is to be exercised; prescribing in each State the times, places and manner of holding elections for representatives involves the law making power of the State; the law making power in this State is the Legislature (Senate and Assembly) and the Governor; the mandate in this case was to the law making power.

Believing that we are right in this conclusion, we do not find it necessary to consider the many other points urged in the briefs.

The order should be affirmed.

Opinion of Hill, J. (Concurring). 361

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER

of

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM WARD, for a Mandamus Order,

Petitioners-Appellants, 362

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervenor-Respondent.

HILL, J. (Concurring):

The government of the Union is supreme within its sphere of action. (M'Culloch v. Maryland, 4 Wheat, .316). First in importance within that sphere is the selection of the persons who are to perform governmental duties. The untrammeled right to select rulers and officials is the primary prerequisite of every free people and nation. No State in the Union holds a suzerainty as to the selection of national legislators or other officials. Such powers as any state of its officials may exer- 363

cise have been delegated by the constitution or by the Congress under the Constitution. The constitution speaks with greater definiteness as to this than as to other matters of less relative importance. "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature". (Section 2, Article 1.) The provision as to the Senate, prior to the seventeenth amendment,
865 was equally definite. "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years;". (Section 3, Article 1.) After definitely fixing the qualifications of electors who may vote for the members of each branch of the Congress, the constitution, by a procedural section (Section 4, Article 1) provides concerning the opportunity to be given for voting and the machinery of the elections. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the
866 Places of chusing Senators." The state legislatures were empowered by this delegation of authority to prescribe regulations for the election of representatives. Legislatures prescribe regulations of conduct by enacting laws. Laws enacted by the legislature of this state are submitted to the Governor for his approval.

This delegated power may be taken away at any time, for "the Congress may at any time by Law

make or alter such Regulations, except as to the Places of chusing Senators". The Federal Act of 1911 by its terms was limited to the apportionment following the thirteenth census. The apportionment here involved is the one following the fifteenth census. The Federal Act of 1929 contains no regulations as to redistricting. There being no Federal statute which applies, the legislature as a law making body, has full authority under the power delegated to it by this section, to prescribe regulations in respect of "The Times, Places and Manner of holding Elections for * * * Representatives". This includes redistricting. The law which the legislature enacts will continue in full force until such time as "Congress may * * * by Law" modify it, or "by Law" make new regulations.

Each provision of the Election Law of this state which applies to the election of representatives in Congress has been passed under the authority delegated to the legislature as a law making body by this provision of the constitution. Section 298 of the Election Law fixes the time and place "of holding Elections for * * * Representatives". The Governor participated in the enactment of that section. If redistricting, which also has to do with the "Places and Manner of holding Elections for * * * Representatives" is to be accomplished by concurrent resolution, then with equal force may it be argued that the above section of the Election Law should have been promulgated by means of a concurrent resolution. Likewise each provision of the Election Law, the Primary Election Law and the Corrupt Practices Act which pertains to the selection of representatives in Congress should have

been the subject of concurrent resolution, for the only power of the law making body of this state in respect of the election of representatives in Congress is that delegated by this section of the Federal Constitution.

It is argued that "legislature" as used in this section, is conceded to have the meaning contended for by the appellants, in so far as it applies to the election of Senators. If this were a fact, it would be a persuasive argument. Chief Judge Marshall, construing the meaning to be given "commerce" in
871 the constitutional provision as to the power of Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes" said "If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it" (Gibbons v. Ogden, 9 Wheat. 1, 194): But I fail to see any foundation for the argument. Section 3, Article 1 provides that senators be "chosen by the legislature" thus describing collectively the persons who should vote, while in Section 4, Article 1, "legislature" is used both as to senators and repre-
872 sentatives as defining a law making body that should prescribe regulations concerning "The Times, Places and Manner of" their election. And, if the "law making" legislature (Section 4, Article 1) failed in any or all particulars to prescribe regulations by law as to the "Times, Places and Manner" of holding elections for senators, then the "voting" legislature (Section 3, Article 1) might adopt rules for their own orderly conduct and guidance as voters.

There has been a practical construction of this section, not only each time that the several states have been redistricted for decades, but also each time that the law making power in a state has enacted a provision of the Election Law which applies in whole or in part to the "Times, Places and Manner of holding Elections for * * * Representatives". If a doubt existed as to the meaning of the provision, a practice so long settled and established should be followed (The Pocket Veto Case, 279 U. S. 655, 688).

I concur for affirmance. 374

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876 **Stipulation Pursuant to Section 170 of the Civil Practice Act.**

IT IS HEREBY STIPULATED that the foregoing are true copies of the record of the Appellate Division of the Supreme Court, Third Department, of the order appealed from, the opinions of the Appellate Division, the notice of appeal, all of which are on file in the office of the Clerk of the County of Albany. Certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, New York, January 12th, 1932.

877 ABRAHAM S. GILBERT and
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners-Appellants.

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Respondent.

JOHN GODFREY SAXE,
Attorney for Intervenor-Respondent.

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STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, Louis J. Rezzemini, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of In the Matter of Samuel S. Koenig et al., Appellants, against Edward J. Flynn, as Secretary of State, et al., Respondents, decided by the Court of Appeals on the 9th day of February, 1932, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 23rd day of February, 1932.

Louis J. Rezzemini, as Reporter of the Court of Appeals of the State of New York. (Seal Court of of Appeals of the State of New York.

Attest: Wm. J. Armstrong, Clerk of the Court of Appeals. (L. S.)

STATE OF NEW YORK,
Court of Appeals:

I, Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that William J. Armstrong is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that Louis J. Rezzemini is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of In the Matter of Samuel S. Koenig et al., Appellants, against Edward J. Flynn, as Secretary of State, et al., Respondents, decided by the said Court of Appeals on the 9th day of February, 1932, is in due form and sufficient under the laws of the State of New York

and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of William J. Armstrong, as clerk of said court, appended thereto is the true and genuine signature of said William J. Armstrong, and the signature of Louis J. Rezzemini, as reporter of said court, appended thereto is the true and genuine signature of said Louis J. Rezzemini.

In witness whereof I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall in the City of Albany and State of New York on the 23rd day of February in the year one thousand nine hundred and thirty-two.

Benjamin N. Cardozo, as Chief Judge of the Court of Appeals of the State of New York.

In the Matter of the Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order, Appellants, v. EDWARD J. FLYNN, Secretary of State of the State of New York, Respondent, and JAMES A. FARLEY, Chairman of the Democratic State Committee, Intervener-Respondent.

Decided February 9, 1932

Appeal from an order of the Appellate Division, third department, affirming an order of the Special Term denying an application for a mandamus order.

Abraham S. Gilbert and Benjamin L. Fairchild for appellants.

John J. Bennett, Jr., Attorney-General, for respondent.

John Godfrey Saxe for the intervener-respondent.

CRANE, J.:

Following the census of 1910, Congress enacted the Thirteenth Apportionment Act, in August of 1911 (Vol. 37, U. S. Statutes at Large, chap. 5, p. 13). It reads in part as follows:

"That after the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed of four hundred and thirty-three Members, to be apportioned among the several States as follows: * * * New York, forty-three.

"Sec. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress, shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

"Sec. 4. That in case of an increase in the number of representatives in any State under this apportionment, such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed."

Thereafter, and in accordance with this act of Congress, New York State passed an act known as chapter 890 of the Laws of 1911, which became a law on October 18, 1911, with the approval of the Governor. It read: "For the election of representatives in congress of the United States, this state shall be and is hereby divided into forty-three districts, namely—" The districts were then described, and it wound up by stating that all acts inconsistent with this law were repealed.

Thus the matter stood. Representatives were elected in this State from the congressional districts described in this State law of 1911, up to and until the present time. Another census was taken, pursuant to an act of Congress, passed June 18, 1929. This act not only provided for the taking of the census, but also provided for the increase or decrease in State representation according to the results of the census. The total number of Representatives was not to be increased. (46 U. S. Stat. at Large, chap. 28, June 18, 1929.) That part of the act providing for the apportionment of Representatives is also to be found in Mason's Code (Vol. 5, No. 3, October, 1929, p. 20). Section 22(a) reads as follows:

"On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners: [the rule is then stated]
* * *

"(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this Act or subsequent statute, to the number of Representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the Clerk of the last House of Representatives forthwith to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. * * *"

This much of the act of June 18, 1929, I have quoted, in order to show that it provided for the apportionment of four hundred and thirty-three Representatives among the various States according to population as indicated by the census, but in no way indicated how the number of Representatives allotted to each State should be chosen. The previous apportionment act of August 8, 1911, in sections 3 and 4, above quoted, made such a direction, but it is lacking in this later act of June 18, 1929. Upon the certificate of the President to Congress, followed by the certificate of the Clerk of the House, all in accordance with the provisions of the census and apportionment act of June 18, 1929, New York became entitled to forty-five Representatives instead of the forty-three apportioned to it under the act of 1911. This was an increase of two. How are the two to be elected?

The New York Legislature determined that it could be done by a joint resolution, and on April 10, 1931, divided

the State into forty-five congressional districts in this manner. The concurrent resolution not being a law was, of course, not submitted to the Governor for his approval, pursuant to the Constitution of this State. This method of electing Congressmen is here challenged on two grounds: First, because the Legislature must redistrict the State by a duly enacted law, and not by resolution, and second, if this be not so, the act of Congress, August 8, 1911, is still in force and effect.

The Constitution of the United States, article I, section 4, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

By the Constitution of the State of New York, article III, section 1, the legislative power of the State is vested in the Senate and Assembly. The law-making power, however, includes control or supervision by the Governor in so far as it is provided by article IV of the Constitution, section 9, that:

"Every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the Governor."

When this government began to function under the Constitution adopted in 1787-1789, the then existing States apparently understood section 4, article I, of the Federal Constitution to refer to the law-making power of the Legislature or to such bodies as the individual States had created for the enactment of laws. The uninterrupted practice in all of the States has been to create congressional districts by laws enacted in accordance with the Constitution of the respective States, whatever that may be. While the plain

and direct provisions of a constitution cannot be modified or amended by practice, custom or violation, no matter how long continued, such uniformity by all the States in the method of electing Congressmen indicates quite clearly the meaning which was given to section 4 of article I, especially in the early days when the people were so sensitive to intrusion and control by individual executives. A uniform course of action involving the right to the exercise of an important power by the State government without question is no unsatisfactory evidence that the power is rightfully exercised. (Briscoe v. Bank of Kentucky, 36 U. S. 257; McPherson v. Blacker, 146 U. S. 1, pp. 36, 37; United States v. Sprague, 282 U. S. 716; Matter of Wendell v. Lavin, 246 N. Y. 115; People v. Tremaine, 252 N. Y. 27.)

The wording of section 4, article I, very likely suggested that the action by the State Legislature under it should be in the form of a law. It was to be more than an assent by the people of the State to some Federal proposition and more than a choice by them of a Federal representative. The legislative act was to be a direction to the people of the State demanding certain things to be done, fixing a time, a place, and a manner which had to be followed. From the Legislature was to come a mandate, the disobedience of which would result in penalties or legal consequences. Naturally, this would be effected in the same way as all other like mandates. The action of the Legislature would, therefore, be in the form of a law. Section 4 says that the times, places and manner shall be "prescribed" by the Legislature. "Prescribed" means to lay down authoritatively a rule of action. From time immemorial this has been done by a law according to the forms existing at the time. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law. Such a direction must take the form of law. Likewise, in section 4, we find that Congress may exercise the power given to the State Legislature, and when it makes its regulations, it shall do so "by law." The matter being dealt with in section 4 is the time, place and manner of holding elections for Representatives. Whether these details be fixed by the Legislature of the State or by Congress, they are to be fixed by law. If Congress must do it by law, it is reasonable to suppose that the State Legislature was intended to do it in the same way. This at least has been the interpretation

given to this section for over one hundred and forty years, and it is too late now to overturn it.

There is a distinction to be drawn between the functions of a Legislature, such, for instance, as choosing Senators, making application to the Federal government for protection against invasion, ratifying a constitutional amendment, consenting to a purchase of State lands—there is, I say, a difference between these functions of the Legislature and the prescribing or enacting of a rule or direction, which must be followed and obeyed by the people of the State, called the law-making power; such, for instance, as dividing the State into congressional districts and directing the people where, when and how to vote. We find such a distinction referred to in McPherson v. Blacker (146 U. S. 1); State ex rel. Davis v. Hildebrant (241 U. S. 565); Hawke v. Smith (253 U. S. 221); United States v. Sprague (282 U. S. 716), although these cases did not pass upon the point here in question. (See, also, Matter of Doyle, 257 N. Y. 244.) We conclude, therefore, that the resolution of April 10, 1931, was ineffective, and that its attempted redistricting of the State is null and void.

Even if this were not so, we would be inclined to hold that the act of Congress, August 8, 1911, was still in force and effect as a regulation to be followed in providing for the election of an additional number of Representatives. Section 3 of that act certainly is a general provision which practically can apply to any increase or decrease in the number of Representatives. Section 4, while in terms limited to the apportionment under the act of 1911, also provides and enacts a general rule which may be adopted to subsequent changes in the number of Representatives, the rule being that additional Representatives are to be elected at large and the others according to existing laws. This is simple, direct and universal. The act of June 18, 1929, did not touch these matters, made no reference whatever to the provisions enacted in sections 3 and 4 of the Laws of 1911. The number of Representatives in any given State was automatically readjusted upon the certificate of the President after each census. This was the only thing accomplished by the act of June 18, 1929. We do not think that Congress intended to repeal the act of 1911 or thought that it would terminate upon the passage of the subsequent act. The two should be read together, if possible. One provided for the

method of election and the other merely for the number of Representatives. The two can be read together as a fair and reasonable regulation by Congress for the election of its Representatives, and this is the view we shall take of it.

Even if we were to take a different view, however, our conclusion would be that by the act of 1911 and the similar acts that preceded it, there had been a practical recognition by Congress of the just and reasonable rule to be followed in the absence of a statute, and that this rule should be adhered to even if the statute does not govern ex proprio vigore.

With this expression of our opinion, we hold that the resolution of April 10, 1931, is without effect; that forty-three of the forty-five Congressmen are to be elected according to the districts created by chapter 890 of the Laws of 1911 of the State of New York, as amended, and the additional two will be elected at large by the entire State. This, of course, is in the absence of a law passed by the present Legislature now in session, redistricting the State into forty-five congressional districts.

The order below should be affirmed, without costs.

Cardozo, Ch. J., Pound, Lehman, O'Brien and Hubbs, JJ., concur; Kellogg, J., not sitting.

Order affirmed.

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 9th day of February in the year of our Lord one thousand nine hundred and thirty-two, before the Judges of said Court.

Witness, the Hon. Benjamin N. Cardozo, Chief Justice, presiding.

Wm. J. Armstrong, Clerk.

Remittitur February 10th, 1932.

In the Matter of the Application of SAMUEL KOENIG & Ors. for a Mandamus or*edr* ag'st EDWARD J. FLYNN, Secretary of State &c. and JAMES A. FARLEY, Chairman, etc., Intervener

Be it Remembered, that on the 15th day of January in the year of our Lord one thousand nine hundred and thirty-

two Samuel S. Koenig & ors., the appellants in this cause, came here unto the Court of Appeals, by Abraham S. Gilbert & ors., their attorney-, and filed in the said Court a Notice of Appeal and return thereto from the Order of the Appellate Division of the Supreme Court in and for the third Judicial Department. And Edward J. Flynn, Secretary of State, and James A. Farley, Chairman &c. Intervenur the respondent in said cause, afterwards appeared in said Court of Appeals by John J. Bennett, Jr., Attorney General and John Godfrey Saxe, their attorney-.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by *Mr.* Messrs. Abraham S. Gilbert and Benjamin L. Fairchild, of counsel for the appellants, and by Mr. Henry Epstein, of counsel for the respondent and by John Godfrey Saxe, and after due deliberation had thereon, did order and adjudge that the Order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without cocts.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed, without costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, February 10th, 1932

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the

Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal.)

At a Term of the Supreme Court held in and for the County of Albany, at the County Court House, in the City of Albany, N. Y., on the 11th day of February, 1932.

Present: Honorable F. Walter Bliss, Justice Presiding.

SUPREME COURT, ALBANY COUNTY

In the Matter of the Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ, and WILLIAM L. WARD for a Mandamus Order, Petitioners-Appellants,

against

EDWARD J. FLYNN, Secretary of State of the State of New York, Respondent, and JAMES A. FARLEY, Chairman of the Democratic State Committee, Intervenor-Respondent

The petitioners-appellants herein having appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Judicial Department, affirming an order of the Supreme Court, Special Term, entered in the office of the Clerk of Albany County November 12, 1931, denying the petitioners' application for an order of mandamus directed to the Secretary of State, respondent herein, and the said appeal from the said order of the Appellate Division having been regularly brought on to be heard at a term of that court on the 15th day of January, 1932, and the petitioners-appellants having appeared by Abraham S. Gilbert, Esq., and Benjamin L. Fairchild, Esq., and the respondent Secretary of State having appeared by John J. Bennett, Jr., Attorney General of the State of New York (Henry Epstein, First Assistant Attorney General, of Counsel) and the intervenor-respondent, James A. Farley, Chairman of the Democratic State Committee, having appeared by John Godfrey Saxe, Esq., and the said appeal having been duly argued and the Court of Appeals having unanimously affirmed said order of the Supreme Court, Appellate Division, without costs,

Now, on reading and filing the remittitur from the Court of Appeals, and upon motion of John J. Bennett, Jr., Attorney General, attorney for the respondent, Secretary of State, it is

Ordered, that said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court.

F. Walter Bliss, J. S. C.

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, John A. Knox, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Order with the original thereof filed in this office on the 11 day of Feb. 1932 and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 23 day of Feb. 1932.

John A. Knox, Clerk. (Seal County of Albany.)

SIR:

Take notice that the within is a copy of order for judgment on remittitur duly filed and entered in the office of the Clerk of Albany County, on the 11 day of Feb. 1932.

Yours, etc., John J. Bennett, Jr., Attorney-General.

[Endorsed:] Supreme Court, Albany County. In the Matter of the Application of Samuel S. Koenig, etc., Petitioners-Appellants, against Edward J. Flynn, Secretary of State, etc., Respondent, and James A. Farley, Etc., Intervenor-Respondent. Copy. Order for judgment on remittitur. John J. Bennett, Jr., Attorney-General, Attorney for Respondent, Office and Post Office Address, Capitol, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 15, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.